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THIS SUPPLEMENT CONTAINS

Statutes:

All laws specifically codified by the General Assembly of the State of Georgia through the 2015 Regular Session of the General Assembly.

Annotations of Judicial Decisions:

Case annotations reflecting decisions posted to LexisNexis® through April 3, 2015. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

Annotations of Attorney General Opinions:

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through April 3, 2015.

Other Annotations:

References to:

Emory Bankruptcy Developments Journal.
Emory International Law Review.
Emory Law Journal.
Georgia Journal of International and Comparative Law.
Georgia Law Review.
Georgia State University Law Review.
John Marshall Law Review.
Mercer Law Review.
Georgia State Bar Journal.
Georgia Journal of Intellectual Property Law.
American Jurisprudence, Second Edition.
American Jurisprudence, Pleading and Practice.
American Jurisprudence, Proof of Facts.
American Jurisprudence, Trials.
Corpus Juris Secundum.
Uniform Laws Annotated.
American Law Reports, First through Sixth Series.
American Law Reports, Federal.

Tables:

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2015 Regular Session of the General Assembly.

Indices:

A cumulative replacement index to laws codified in the 2015 supplement pamphlets and in the bound volumes of the Code.

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TITLE 24

EVIDENCE

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- 12. Medical and Other Confidential Information, 24-12-1 through 24-12-31.
- 13. Securing Attendance of Witnesses and Production and Preservation of Evidence, 24-13-1 through 24-13-154.

Law reviews. — For article, “The Best Evidence Rule Made Better: A Glimpse into Georgia’s New Evidence Code,” see 19 Ga. St. B.J. 12 (Aug. 2013). For annual survey on evidence law, see 64 Mercer L.

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4. Other Agreements (Cont'd)

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sible under the necessity exception set forth in O.C.G.A. § 24-3-1(b); therefore, the defendant's counsel was not deficient because there is no deficient performance when an attorney fails to object to admissible evidence. *Bulloch v. State*, 293 Ga. 179, 744 S.E.2d 763 (2013).

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Cited in *Dulcio v. State*, 292 Ga. 645, 740 S.E.2d 574 (2013); *Garcia-Carrillo v. State*, 322 Ga. App. 439, 746 S.E.2d 137 (2013); *Hernandez-Garcia v. State*, 322 Ga. App. 455, 745 S.E.2d 706 (2013); *Folston v. State*, 294 Ga. 778, 755 S.E.2d 803 (2014).

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Relevant Evidence in Criminal Cases

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thus, was not relevant under former O.C.G.A. § 24-2-1 to the issue of intent. *Hickey v. State*, 325 Ga. App. 496, 753 S.E.2d 143 (2013) (decided under former O.C.G.A. § 24-2-4).

Stipulation at administrative license suspension hearing relevant. — Defendant’s stipulation at the administrative license suspension hearing that the defendant would plead guilty to driving under the influence of alcohol in exchange for the return of the defendant’s driver’s license was relevant to, though certainly not dispositive of, the charge that the defendant was driving under the influence of alcohol. *Flading v. State*, 327 Ga. App. 346, 759 S.E.2d 67 (2014).

Signs and fliers relevant to show defendant’s bent of mind. — Images and language incorporated into the sign and fliers that the defendant displayed or distributed concerning the defendant’s child’s mother, the victim, at or near the victim’s workplace demonstrated the state of the relationship between the defendant and the victim, and were “highly relevant” to show the defendant’s abusive bent of mind toward the victim. *Hudson v. State*, 321 Ga. App. 702, 742 S.E.2d 516 (2013).

24-4-402. Relevant evidence generally admissible; irrelevant evidence not admissible.

JUDICIAL DECISIONS

ANALYSIS

IRRELEVANT EVIDENCE IN CIVIL CASES

Irrelevant Evidence in Civil Cases

Evidence in malicious prosecution case. — Malicious prosecution case was remanded to the trial court because the trial court, after concluding that plaintiff's past criminal history was relevant, should have thereafter considered

whether the plaintiff's prior arrests nevertheless should be excluded because of their inherently prejudicial nature or because those arrests potentially would confuse or mislead the jury. *Rivers v. K-Mart Corp.*, 321 Ga. App. 788, 743 S.E.2d 464 (2013).

24-4-403. Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.

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Prejudicial impact outweighed probative value in child abuse case. —

While the physician's opinion regarding the victim's hymen being intact and then later not intact was compelling evidence that the victim had been sexually abused, it was much less probative of the question of whether it was the defendant who had molested the victim because the defendant lacked access to the victim during the relevant time period and, thus, should not have been admitted into evidence. *State v. Chapman*, 322 Ga. App. 82, 744 S.E.2d 77 (2013).

Evidence of gang membership improperly admitted. —

Because there was no evidence whatsoever that the robberies were gang-related, and the defendant's prior gang affiliation had minimal probative value with regard to identity, the trial court abused the court's discretion in admitting the evidence of the defendant's gang membership; however, the error was harmless and did not require reversal as the victim identified the defendant in court; a police officer saw the defendant in the same apartment complex where the crimes occurred on the day of the crimes' commission; and the defendant was apprehended two days after the robbery in the same apartment complex wearing a red hat and red jacket matching that described by the victim. *Lingo v. State*, 329 Ga. App. 528, 765 S.E.2d 696 (2014).

Improper prejudice from admission of criminal record during damage phase of trial. — Trial court did not abuse the court's discretion in ruling that the probative value of the defendant's criminal record, introduced during the

damages stage only when the jury could be instructed on the proper use of the evidence, was not substantially outweighed by the danger of improper prejudice. *Rivers v. K-Mart Corp.*, 329 Ga. App. 495, 765 S.E.2d 671 (2014).

Prejudice of cocaine conviction must substantially outweigh probative value. —

Although the victim's conviction for possession of cocaine might have been admissible as the conviction was less than 10 years old and constituted a crime punishable by imprisonment in excess of one year, the trial court erred in merely finding that the probative value of the victim's prior conviction for possession of cocaine was outweighed by the conviction's prejudicial effect and by not requiring the state to show that such prejudice substantially outweighed any probative value; however, the error was harmless because the admission of the victim's prior conviction would have been cumulative of the victim's own damaging testimony. *Williams v. State*, 328 Ga. App. 876, 763 S.E.2d 261 (2014).

Probative value of stipulation not outweighed by prejudicial impact. —

Because the final decision at the administrative license suspension hearing, which contained the defendant's stipulation that the defendant would plead guilty to driving under the influence of alcohol in exchange for the return of defendant's driver's license, was neither of scant or cumulative probative force nor introduced by the state merely for the sake of its prejudicial effect, and because its probative value was not substantially outweighed by its prejudicial effect, the trial court properly allowed admission of the

final decision in the defendant’s criminal case over the defendant’s objection. *Flading v. State*, 327 Ga. App. 346, 759 S.E.2d 67 (2014).

Probative value outweighed any undue prejudice in criminal case. — In an armed robbery case, the trial court did not err in admitting a prior armed robbery conviction because the defense’s theory that the defendant was present during the current armed robbery but had not participated in robbing the victim squarely challenged the element of intent; there was sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the 2008 armed robbery; the 2008 armed robbery was factually similar to the current armed robbery; and the probative value outweighed any undue prejudice as intent was contested, in that the defendant had admitted to being present but denied participating in the armed robbery. *Logan-Goodlaw v. State*, 331 Ga. App. 671, 770 S.E.2d 899 (2015).

Character evidence admissible for intent. — Trial court did not abuse the

court’s discretion in finding that the defendant’s prior bad acts were admissible because the defendant pled not guilty, thereby making intent a material issue; thus, the defendant’s position of intending only to help the victims, but not to commit any criminal offenses, squarely challenged the element of intent and the witness testified that the defendant sold the witness as a prostitute and held the witness against their will, just like the defendant did with the victims in the case. *Curry v. State*, 330 Ga. App. 610, 768 S.E.2d 791 (2015).

Statement of employee nurse of defendant relevant. — Trial court did not abuse the court’s discretion in admitting the testimony of the plaintiff’s daughter over the defendant’s objection as an admission by a party opponent because the statement was made by a nurse employed by the defendant and was relevant to the slip and fall case. *Emory Healthcare, Inc. v. Pardue*, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

24-4-404. Character evidence not admissible to prove conduct; exceptions; other crimes.

JUDICIAL DECISIONS

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- 1. IN GENERAL
- 2. CHARACTER
- 3. SPECIFIC CRIMES
 - a. ASSAULT, BATTERY, AND HOMICIDE CRIMES
 - b. ROBBERY, BURGLARY, AND THEFT CRIMES
- 4. VICTIM’S CHARACTER

Criminal Cases

1. In General

Past physical and verbal abuse admissible. — Evidence of the defendant’s past physical and verbal abuse of the victim was admissible as proof of the relationship between the defendant and the victim and to show the defendant’s motive and intent. *Faircloth v. State*, 293 Ga. 134,

744 S.E.2d 52 (2013).
Admission of similar transaction evidence not proper. — State failed to prove that the defendant’s prior attempted robbery was so similar to the charged offense that the charged offense must have been the defendant’s handiwork as robbery of a woman alone at night after the woman had parked the car was not in the nature of a signature so as to be proof of the perpetrator’s identity. *Amey v.*

Criminal Cases (Cont'd)**1. In General (Cont'd)**

State, 331 Ga. App. 244, 770 S.E.2d 321 (2015).

Evidence of other conduct or crimes was admissible in the following cases.

Since the prior incidents and the incident for which the defendant was being prosecuted all involved the defendant or an accomplice being in employee-only areas when the stores were open and employees were present, the similarities were adequate to satisfy the state's burden of showing a sufficient connection between similar offenses and the instant offense. *Spinks v. State*, 322 Ga. App. 387, 745 S.E.2d 653 (2013).

Evidence of prior difficulties between the defendant and the victim was admissible to show an ongoing scheme and given that the evidence was not so complex that the jury was unable to distinguish the evidence. *Madison v. State*, 329 Ga. App. 856, 766 S.E.2d 206 (2014).

2. Character**Evidence of motive.**

Trial court did not violate former O.C.G.A. § 24-2-2 in admitting evidence of the defendant's extramarital relationship with another woman as it showed that the defendant had a motive to conceal the defendant's extramarital affair with the victim not only from the defendant's wife, but from the other woman. *Washington v. State*, 294 Ga. 560, 755 S.E.2d 160 (2014) (decided under former O.C.G.A. § 24-2-2).

Evidence incidentally reflecting on character not barred.

Testimony that the defendant had another child was admissible even though the testimony might incidentally place the defendant's character at issue because the testimony was relevant to explain why the 12-year-old victim, who had initially fabricated a story about the father of the child, later said that the victim had a sexual relationship with the defendant; and because, given the overwhelming evidence demonstrating that the defendant was the father of the defendant's 12-year-old niece's child, it was unlikely

that the testimony negatively impacted the outcome of the defendant's case, and the failure to demonstrate harm from an alleged error precluded reversal. *Andrews v. State*, 331 Ga. App. 353, 771 S.E.2d 59 (2015).

Character evidence admissible.

Trial court did not abuse the court's discretion in finding that the defendant's prior bad acts were admissible because the defendant pled not guilty, thereby making intent a material issue; thus, the defendant's position of intending only to help the victims, but not to commit any criminal offenses, squarely challenged the element of intent and the witness testified that the defendant sold the witness as a prostitute and held the witness against their will, just like the defendant did with the victims in the case. *Curry v. State*, 330 Ga. App. 610, 768 S.E.2d 791 (2015).

Trial court did not err in finding that the defense opened the door to the admission of character evidence because, although counsel's question to the witness might not have been specifically aimed at eliciting character evidence, it was, as admitted by counsel, part of counsel's trial strategy to allow the witness to give lengthy and nonresponsive answers to questioning; and the trial court exercised the court's discretion and concluded that counsel's conscious decision not to object or redirect the nonresponsive witness once the witness made a reference to the defendant's character created an inference that counsel intended to inject character evidence into the trial and thus triggered the state's right to explore and impeach that testimony. *Harris v. State*, 330 Ga. App. 267, 765 S.E.2d 369 (2014) (decided under former O.C.G.A. § 24-2-2).

3. Specific Crimes**a. Assault, Battery, and Homicide Crimes****Admission of similar transaction proper.**

Trial court did not err in admitting evidence of the 1999 incident in which the defendant was standing on the defendant's ex-girlfriend's porch with the ex-girlfriend, the ex-girlfriend's daughter, and other children when the defendant

pulled out a handgun, pointed the handgun at the people on the porch, and pulled the trigger, although the gun did not fire, because, in both the current and prior incident, the defendant pulled out a handgun and aimed the handgun at a person with whom the defendant had a dispute, in a residential area, ignoring the presence of innocent bystanders, including a child. *Brown v. State*, 295 Ga. 804, 764 S.E.2d 376 (2014).

When the defendant was convicted of malice murder for setting the victim on fire and burning the victim's apartment building with a Molotov cocktail, the state was properly allowed to introduce similar transaction evidence that the defendant attempted to burn down the house of the defendant's sister using a Molotov cocktail because the evidence was introduced for the proper purpose of showing the defendant's intent, bent of mind, course of conduct, and identity; there were clear similarities between the current and previous crimes, including that the victims were women with whom the defendant had a close relationship; and the choice of a unique weapon, a Molotov cocktail, was the same. *Scruggs v. State*, 295 Ga. 840, 764 S.E.2d 413 (2014).

Similar transaction evidence admissible.

Evidence relating to a North Carolina traffic stop and seizure of currency was properly admissible as the stop, also involving both defendants, a car registered in Massachusetts, with dark tinted windows, a single key in the ignition, religious insignias throughout, and a hidden compartment with shrink-wrapped items, was sufficiently similar that proof of that incident tended to prove the current incident. *Betancourt v. State*, 322 Ga. App. 201, 744 S.E.2d 419 (2013).

b. Robbery, Burglary, and Theft Crimes

Admission of similar transaction evidence proper.

Trial court did not abuse the court's discretion by allowing the state to introduce the evidence of a similar robbery to show the defendant's intent and modus operandi or course of conduct, which were legitimate purposes at the time of trial,

because the state presented sufficient evidence that the defendant committed the other robbery, which involved robbing a restaurant night manager at closing time while concealing the face with clothing. *Martin v. State*, 324 Ga. App. 252, 749 S.E.2d 815 (2013).

In an armed robbery case, the trial court did not err in admitting a prior armed robbery conviction because the defense's theory that the defendant was present during the current armed robbery but had not participated in robbing the victim squarely challenged the element of intent; there was sufficient proof to enable a jury to find by a preponderance of the evidence that the defendant committed the 2008 armed robbery; the 2008 armed robbery was factually similar to the current armed robbery; and the probative value outweighed any undue prejudice as intent was contested in that the defendant had admitted to being present but denied participating in the armed robbery. *Logan-Goodlaw v. State*, 331 Ga. App. 671, 770 S.E.2d 899 (2015).

Evidence of gang membership improperly admitted. — Because there was no evidence whatsoever that the robberies were gang-related, and the defendant's prior gang affiliation had minimal probative value with regard to identity, the trial court abused the court's discretion in admitting the evidence of the defendant's gang membership; however, the error was harmless and did not require reversal as the victim identified the defendant in court; a police officer saw the defendant in the same apartment complex where the crimes occurred on the day of the crimes' commission; and the defendant was apprehended two days after the robbery in the same apartment complex wearing a red hat and red jacket matching that described by the victim. *Lingo v. State*, 329 Ga. App. 528, 765 S.E.2d 696 (2014).

Similar transaction evidence admissible.

Because the evidence of the four independent offenses that included car jackings and robberies were sufficiently similar to the charged crimes in the defendant's current case in that the offenses involved the use of a handgun to subdue

Criminal Cases (Cont'd)
3. Specific Crimes (Cont'd)
b. Robbery, Burglary, and Theft
Crimes (Cont'd)

the victims, cooperation between the defendant and the first co-defendant, the common motive of robbery, and luring the victims to the crime scenes where the victims were assaulted and robbed, the trial court did not err in admitting evidence of the four independent offenses at trial. *Geiger v. State*, 295 Ga. 648, 763 S.E.2d 453 (2014).

4. Victim's Character

Long-standing requirement for admission of victim's character evidence not changed. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia's long-standing requirement that a defendant must first make a *prima facie* showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible. *Oliver v. State*, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Evidence of victim's violent character may be admitted when defendant acted in self-defense.

Because the defendant failed to make a *prima facie* showing that the defendant acted in self-defense and evidence of the victim's propensity for violence could not

be introduced, the defendant could not satisfy the requirement of demonstrating a pertinent trait of character of the alleged victim of the crime, and there was no need to address the defendant's contention that the court incorrectly applied the rule regarding the methods of proving character. *Oliver v. State*, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Since the defendant failed to make a *prima facie* showing that the defendant acted in self-defense when the defendant shot the victim because the defendant was the aggressor and the victim would have been justified in using force to subdue the defendant, the trial court did not abuse the court's discretion in excluding evidence of the victim's propensity for violence. *Oliver v. State*, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Evidence of victim's violent acts.

Trial court did not err in refusing to let the defendants call the co-indictee as a witness to testify about the prior acts of violence the co-indictee committed in 1994 for choking the co-indictee's mother and in 2004 for choking another person because the co-indictee's counsel announced that the co-indictee would invoke the co-indictee's privilege against self-incrimination as to any questions about those prior acts and the trial court reasonably concluded that any questions as to the co-indictee's past violent acts could incriminate the co-indictee and affect the co-indictee's pending trial. *Brown v. State*, 295 Ga. 804, 764 S.E.2d 376 (2014).

24-4-405. Methods of proving character.

Law reviews. — For annual survey on evidence, see 65 *Mercer L. Rev.* 125 (2013).

JUDICIAL DECISIONS

Good character conduct evidence in child molestation trial. — In a child molestation case, the appellate court could not reach the merits of the defendant's claim regarding the exclusion of specific instances of conduct testimony from character witnesses for the defense

because the affidavits from three of the character witnesses who testified at trial failed to identify any specific instance of the defendant's conduct that the witnesses were unable to testify to; furthermore, the defendant was able to present a variety of evidence regarding the defen-

dant’s good character, including specific instances of conduct. *Goggins v. State*, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Testimony regarding defendant’s character trait of moral behavior and trustworthiness. — In a child molestation case, the trial court did not restrict the defendant’s character witnesses’ ability to testify as to the defendant’s character trait of moral behavior and trustworthiness with children as three witnesses testified as to that character trait, and any additional testimony regarding the defendant’s morality and trustworthiness with children would have been cumulative. *Goggins v. State*, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

Long-standing requirement for admission of victim’s character evidence not changed. — There is no reason to construe the rules regarding the admission of character evidence as a modification of Georgia’s long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining

to the victim’s character is admissible. *Oliver v. State*, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Failure to make prima facie case of self defense meant victim’s propensity for violence irrelevant. — Because the defendant failed to make a prima facie showing that the defendant acted in self-defense and evidence of the victim’s propensity for violence could not be introduced, the defendant could not satisfy the requirement of demonstrating a pertinent trait of character of the alleged victim of the crime, and there was no need to address the defendant’s contention that the court incorrectly applied the rule regarding the methods of proving character. *Oliver v. State*, 329 Ga. App. 377, 765 S.E.2d 606 (2014).

Limiting evidence as cumulative. — Trial court did not err in limiting the scope of evidence regarding the defendant’s good character as the additional testimony the defendant sought to have introduced would have been cumulative. *Goggins v. State*, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

24-4-408. Compromises and offers to compromise.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

24-4-412. Complainant’s past sexual behavior not admissible in prosecutions for certain sexual offenses; exceptions.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
CHILD MOLESTATION
RAPE

General Consideration

Identification of alternate sexual partner. — When the defendant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes, trial counsel was not ineffective in failing to investigate alternate sources of the victim’s pregnancy and injuries because trial counsel testified that identify-

ing an alternate sexual partner might have conflicted with the rape shield statute; any sexual contact after the crime would not have been relevant to the victim’s injuries and would have been highly prejudicial; and, in light of the victim’s testimony, the victim’s immediate outcry, and the evidence of male DNA found inside the victim and the victim’s vaginal injury, it was not reasonably likely that

General Consideration (Cont'd)

the result of the trial would have been different. *Davis v. State*, 329 Ga. App. 797, 764 S.E.2d 588 (2014) (decided under former O.C.G.A. § 24-2-3).

Child Molestation

Charge stating child under 16 could not consent to sexual intercourse. — Trial court did not plainly err in charging the jury that a child under the age of 16 years could not consent to sexual intercourse. *Algren v. State*, 330 Ga. App. 1, 764 S.E.2d 611 (2014).

Rape

Exclusion of previous consensual sexual relationship. — In a case decided under former O.C.G.A. § 24-2-3, the trial court did not err in granting the state’s motion in limine to exclude evidence that the defendant and the victim had a prior sexual relationship as there was no way, given the circumstances of the episode, that the defendant reasonably believed the victim consented to sexual intercourse, even if the victim had previously done so. *Johnson v. State*, 322 Ga. App. 612, 744 S.E.2d 903 (2013) (decided under former O.C.G.A. § 24-2-3).

CHAPTER 5

PRIVILEGES

Sec.
24-5-501. Certain communications privileged.
24-5-510. Privileged communications between law enforcement officers and peer counselors.

24-5-501. Certain communications privileged.

(a) There are certain admissions and communications excluded from evidence on grounds of public policy, including, but not limited to, the following:

- (1) Communications between husband and wife;
- (2) Communications between attorney and client;
- (3) Communications among grand jurors;
- (4) Secrets of state;
- (5) Communications between psychiatrist and patient;
- (6) Communications between licensed psychologist and patient as provided in Code Section 43-39-16;
- (7) Communications between a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor and patient;
- (8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in

psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient’s communications which are otherwise privileged by paragraph (5), (6), or (7) of this subsection; and

(9) Communications between accountant and client as provided by Code Section 43-3-29.

(b) As used in this Code section, the term:

(1) “Psychotherapy” means the employment of psychotherapeutic techniques.

(2) “Psychotherapeutic techniques” shall have the same meaning as provided in Code Section 43-10A-3. (Code 1981, § 24-5-501, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2014, p. 136, § 2-1/HB 291.)

The 2014 amendment, effective July 1, 2014, substituted “Code Section 43-3-29” for “Code Section 43-3-32” in paragraph (a)(9).

JUDICIAL DECISIONS

ANALYSIS

COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT
3. BY REASON OF ANTICIPATED EMPLOYMENT
11. APPLICATION IN OTHER SPECIFIC ACTIONS

Communications Between Attorney and Client

11. Application in Other Specific Actions

3. By Reason of Anticipated Employment

Attorney attacking judgment.

Privilege continues after client’s death.

Attorney-client privilege applies to communications between a law firm’s attorneys and its in-house counsel regarding a client’s potential claims against the firm when: (1) there is a genuine attorney-client relationship between the firm’s lawyers and in-house counsel; (2) the communications in question were intended to advance the firm’s interests in limiting exposure to liability rather than the client’s interests in obtaining sound legal representation; (3) the communications were conducted and maintained in confidence; and (4) no exception to the privilege applies. *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*, 293 Ga. 419, 746 S.E.2d 98 (2013).

While a civil action arising out of the patient’s suicide may be authorized under Georgia law and application of the protections afforded psychiatrist-patient communications by O.C.G.A. § 24-5-501(a) may pose a hardship to the patient’s parents in the investigation of potential claims against the doctor, neither of those factors authorized the trial court to require the production of privileged communications contrary to § 24-5-501(a). *Cooksey v. Landry*, 295 Ga. 430, 761 S.E.2d 61 (2014).

24-5-505. Party or witness privilege.**JUDICIAL DECISIONS****ANALYSIS****GENERAL CONSIDERATION****General Consideration**

Cited in *State v. Wakefield*, 324 Ga. App. 587, 751 S.E.2d 199 (2013).

24-5-507. Grant of immunity; contempt.**JUDICIAL DECISIONS****ANALYSIS****GRANT OF IMMUNITY****Grant of Immunity**

Court cannot grant use immunity at request of defendant. — Trial court did not err in not granting use immunity to the co-indictee as Georgia law does not

authorize a trial court to grant use immunity to a witness at the request of a defendant. *Brown v. State*, 295 Ga. 804, 764 S.E.2d 376 (2014) (decided under former O.C.G.A. § 24-9-28(a)).

24-5-510. Privileged communications between law enforcement officers and peer counselors.

(a) As used in this Code section, the term:

(1) “Client” means a law enforcement employee or a law enforcement officer’s immediate family.

(2) “Immediate family” means the spouse, child, stepchild, parent, or stepparent.

(3) “Peer counselor” means an employee of a law enforcement agency who has received training to provide emotional and moral support to a client and was designated by a sheriff, police chief, or other head of a law enforcement agency to counsel clients.

(b) Except as provided in subsection (c) of this Code section, communications between a client and a peer counselor shall be privileged. A peer counselor shall not disclose any such communications made to him or her and shall not be competent or compellable to testify with reference to any such communications in any court.

(c) The privilege created by subsection (b) of this Code section shall not apply when:

(1) The disclosure is authorized by the client, or if the client is deceased, by his or her executor or administrator, and if an executor or administrator is not appointed, by the client’s next of kin;

- (2) Compelled by court order;
- (3) The peer counselor was an initial responding officer, witness, or party to an act that is the subject of the counseling;
- (4) The communication was made when the peer counselor was not performing official duties; or
- (5) The client is charged with a crime.

(d) The privilege created by this Code section shall not be grounds to fail to comply with mandatory reporting requirements as set forth in Code Section 19-7-5 or Chapter 5 of Title 30, the “Disabled Adults and Elder Persons Protection Act.” (Code 1981, § 24-5-510, enacted by Ga. L. 2014, p. 339, § 1/HB 872.)

Effective date. — This Code section became effective July 1, 2014.

CHAPTER 6
WITNESSES

ARTICLE 1
GENERAL PROVISIONS

24-6-602. Lack of personal knowledge.

JUDICIAL DECISIONS

Cited in Emory Healthcare, Inc. v. Pardue, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

24-6-606. Juror as witness.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
PRACTICE AND PROCEDURE

General Consideration

Jurors’ statements upon reassembling cannot alter plain import of verdict.
Parents’ motion for a new trial was

properly denied because no testimony was elicited regarding the substance of the definitions found by jurors using cell-phones, and no showing has been made that the information obtained was prejudicial, or even that the information dif-

General Consideration (Cont'd)

ferred from the trial court’s written instructions which went out with the jury. *Armstrong v. Gynecology & Obstetrics of DeKalb, P.C.*, 327 Ga. App. 737, 761 S.E.2d 133 (2014).
Cited in *Ford Motor Co. v. Conley*, 294 Ga. 530, 757 S.E.2d 20 (2014).

Practice and Procedure

New trial warranted due to ex parte communication with jury in civil case. — In a medical malpractice case,

plaintiffs were entitled to a new trial because the communication between the court and the jury was not disclosed to the plaintiffs or the plaintiffs’ counsel until after the verdict, the note and response were not made a part of the record, recollections differed as to the nature and timing of the communication, and it was impossible for the appellate court to determine if a defense verdict would have been demanded regardless of the effect of the communication on the jury. *Phillips v. Harmon*, 328 Ga. App. 686, 760 S.E.2d 235 (2014).

24-6-607. Who may impeach.

JUDICIAL DECISIONS

ANALYSIS

EXAMINATION OF OWN WITNESS

Examination of Own Witness

Use of inconsistent prior statements.
Because the prosecuting attorney laid a proper foundation for a witness’s prior inconsistent statement by questioning the witness about the circumstances of the witness’s earlier statement to investigators and affording the witness an opportunity to admit, explain, or deny the prior contradictory statement about not seeing a gun during the rough play between the defendant and others prior to the murders, the trial court did not abuse the court’s discretion when the court admitted

the witness’s earlier statement. *Edwards v. State*, 293 Ga. 612, 748 S.E.2d 870 (2013).
Trial court did not err in admitting extrinsic evidence of the cousin’s prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. *McNair v. State*, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

24-6-609. Impeachment by evidence of conviction of a crime.

JUDICIAL DECISIONS

Federal interpretation of balancing tests.
Trial court erred by permitting the state to impeach the defendant with evidence of a prior conviction from 1985 for impersonating a police officer without conducting the proper balancing tests under O.C.G.A. § 24-9-84.1(b) as the record showed that the trial court failed to make express findings in determining whether the 1985

conviction was admissible. *Robinson v. State*, No. A14A2206, 2015 Ga. App. LEXIS 208 (Mar. 26, 2015).
In determining whether to admit a prior conviction against a defendant for impeachment purposes, a court should consider: (1) the impeachment value of the crime; (2) the time of the conviction and the defendant’s subsequent history; (3) the similarity between the past crime and

the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Waye v. State*, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

On-the-record finding required.

Trial court erred by failing to make an on-the-record finding of whether the probative value of admitting the defendant's 1991 conviction substantially outweighed its prejudicial effect, and to enter express findings as to whether the probative value of defendant's 1987 conviction substantially outweighed its prejudicial effect. *Waye v. State*, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

Trial court is required to make a different determination regarding a prior felony conviction that is older than ten years and evidence of such a conviction is not admissible unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. *Waye v. State*, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

Trial court must make an on-the-record finding of the specific facts and circumstances upon which the court relies in determining that the probative value of a prior conviction that is more than ten years old substantially outweighs its prejudicial effect before admitting evidence of the conviction for impeachment purposes. *Waye v. State*, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

In considering the admissibility of prior convictions less than ten years old, a trial court must make an on-the-record finding that the probative value of admitting the conviction substantially outweighs its prejudicial effect, but is not required to list the specific factors the court considered in making the court's decision. *Waye v. State*, 326 Ga. App. 202, 756 S.E.2d 287 (2014).

In an action decided under former O.C.G.A. § 24-9-84.1(a)(2), the trial court erred when the court did not make an on-the-record finding of the specific facts and circumstances on which the court relied in determining that the probative value of the 32-year-old convictions substantially outweighed their prejudicial ef-

fect, but only found on the record that despite the fact of their age, the convictions' probative value insofar as impeachment goes outweighed the prejudicial factor to the defendant. *Peak v. State*, 330 Ga. App. 528, 768 S.E.2d 275 (2015) (decided under former O.C.G.A. § 24-9-84.1(a)(2)).

Conviction did not show fraud and deceit.

Trial court did not abuse the court's discretion in preventing the defendant from cross-examining a witness regarding the fact that the witness was on probation because the witness was on probation for misdemeanor shoplifting and the defendant failed to show that such a conviction involved fraud or deceit. *Campbell v. State*, 329 Ga. App. 317, 764 S.E.2d 895 (2014).

Prior conviction properly admitted to impeach defendant's credibility.

Because Georgia's new rules of evidence applied and the defendant's prior felony conviction was not more than 10 years old, the trial court was not required to list the specific factors the court considered in ruling that the prior conviction was admissible for the purpose of generally attacking the defendant's credibility; nevertheless, the trial court did list the factors the court considered, including the fact that the defendant's credibility would be a substantial factor in the case, the probative value of the conviction, the nature of the prior crime of burglary as making it less likely to serve as improper propensity evidence of a drug possession offense, and the age of the prior conviction as mitigating an improper propensity inference. *Smith v. State*, 331 Ga. App. 296, 771 S.E.2d 8 (2015).

Prior conviction of witness improperly excluded. — Although the victim's conviction for possession of cocaine might have been admissible as the conviction was less than 10 years old and constituted a crime punishable by imprisonment in excess of one year, the trial court erred in merely finding that the probative value of the victim's prior conviction for possession of cocaine was outweighed by the conviction's prejudicial effect and by not requiring the state to show that such prejudice substantially outweighed any probative

value; however, the error was harmless because the admission of the victim’s prior conviction would have been cumulative of

the victim’s own damaging testimony. Williams v. State, 328 Ga. App. 876, 763 S.E.2d 261 (2014).

24-6-611. Mode and order of witness interrogation and presentation.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS	
ANALYSIS	
SCOPE OF CROSS-EXAMINATION	
2. DISCRETION OF JUDGE	
LEADING QUESTIONS	
2. PERMITTED	
EXAMINATION OF OPPOSITE PARTY	
1. IN GENERAL	

Scope of Cross-Examination

2. Discretion of Judge

Regulation of scope of cross-examination, etc.
Because the trial court did not abuse the court’s discretion in regulating cross-examination by instructing defense counsel to be clear with counsel’s question, the defendant’s constitutional right of confrontation was not violated. Baker v. State, 293 Ga. 811, 750 S.E.2d 137 (2013) (decided under former O.C.G.A. § 24-9-62).

Leading Questions

2. Permitted

Treatment of hostile witness.

Trial court did not err in allowing the state to treat one of the state’s witnesses, the co-defendant, as a hostile witness, thereby allowing the state to ask leading questions because, although the co-defendant agreed in the plea agree-

ment to testify truthfully about the methamphetamine operation and testify against the defendant, the co-defendant’s testimony was not consistent with the proffer the state was given; the co-defendant professed ignorance about any of the items discovered during the search; and the co-defendant’s testimony was evasive and unresponsive. Lopez-Vasquez v. State, 331 Ga. App. 570, 771 S.E.2d 218 (2015).

Examination of Opposite Party

1. In General

Impeachment on drug use. — Trial court did not err by prohibiting the defendant from questioning the witness about prior drug use in general as the defendant was permitted to ask whether the witness was under the influence at the time the witness saw the two men outside the victim’s house. Boothe v. State, 293 Ga. 285, 745 S.E.2d 594 (2013) (decided under former O.C.G.A. § 24-9-62).

24-6-613. Prior statements of witnesses.

JUDICIAL DECISIONS	
ANALYSIS	
GENERAL CONSIDERATION	

ADMISSIBILITY OF STATEMENT

- 1. IN GENERAL
- 2. WHAT STATEMENTS ADMISSIBLE

General Consideration

Cited in Ryans v. State, 293 Ga. 238, 744 S.E.2d 759 (2013).

Admissibility of Statement

1. In General

Pre-trial statements.

Because the prosecuting attorney laid a proper foundation for a witness’s prior inconsistent statement by questioning the witness about the circumstances of the witness’s earlier statement to investigators and affording the witness an opportunity to admit, explain, or deny the prior contradictory statement about not seeing a gun during the rough play between the defendant and others prior to the murders, the trial court did not abuse the

court’s discretion when the court admitted the witness’s earlier statement. Edwards v. State, 293 Ga. 612, 748 S.E.2d 870 (2013).

2. What Statements Admissible

Prior inconsistent statement.

Trial court did not err in admitting extrinsic evidence of the cousin’s prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. McNair v. State, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

24-6-615. Exclusion of witnesses.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

General Consideration

Witness sequestration rule violated in driving under the influence case. — Trial court erred in denying the defendant’s request to invoke the rule of sequestration and, thus, the defendant was granted a new trial with regard to the defendant’s driving under the influence

conviction because the trial court did not use the court’s discretion to decide that a witness could remain to assist the state or to allow testimony despite an infraction of the rule; the court simply held, incorrectly, that the rule of sequestration did not apply until the first witness was called for trial. Smith v. State, 324 Ga. App. 100, 749 S.E.2d 395 (2013).

ARTICLE 2

CREDIBILITY

24-6-622. Witness’s feelings and relationship to parties provable.

JUDICIAL DECISIONS

ANALYSIS

FEELINGS

Feelings

Bias and prejudice.
Trial counsel was not ineffective for failing to insist that the victim’s entire diary go out with the jury in order to show the victim’s animosity toward the defendant, the victim’s father, as the diary showed only that the victim had negative feelings toward the victim’s mother, not the defendant. *Goggins v. State*, 330 Ga. App. 350, 767 S.E.2d 753 (2014).
Child molestation victim’s feelings regarding parents. — In a child molestation case, trial counsel was not ineffec-

tive in failing to insist that the victim’s entire diary go out with the jury because the evidence of the feelings of the victim, the defendant’s daughter, toward the victim’s parents showed that the victim had animosity toward the mother, rather than the defendant; and the diary entries which referenced the allegations that the defendant had fathered a child out of wedlock and failed to satisfy the financial obligations regarding the defendant’s children would likely have undermined the defendant’s good character defense. *Goggins v. State*, 330 Ga. App. 350, 767 S.E.2d 753 (2014).

CHAPTER 7

OPINIONS AND EXPERT TESTIMONY

24-7-701. Lay witness opinion testimony.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
OPINION TESTIMONY ADMISSIBLE

2. SPECIFIC EXAMPLES

MARKET VALUE EVIDENCE

1. DETERMINATION OF MARKET VALUE

General Consideration

Statement not an opinion.
Investigator’s testimony that early in the interrogation the defendant was play-

ing games and did not want to give the police the full truth was admissible as the challenged evidence was not inadmissible opinion evidence under former O.C.G.A. § 24-9-65, but was relevant as to why the

interview lasted several hours in response to a defense implication that the defendant was subjected to an overly burdensome interrogation. *Jordan v. State*, 293 Ga. 619, 748 S.E.2d 876 (2013) (decided under former O.C.G.A. § 24-9-65).

Cited in *State v. Cooper*, 324 Ga. App. 32, 749 S.E.2d 35 (2013).

Opinion Testimony Admissible

2. Specific Examples

Value of trust assets. — Probate court did not err in allowing a co-executor's husband to testify to an opinion about the value of real property contributed to the trust investments at issue because one need not be an expert or dealer in the article in question to testify to its value if an opportunity for forming a correct opinion has been had, and the husband had testified that to the familiarity with the properties at issue and with comparable properties, which were considered in

reaching the opinion. *In re Estate of Hubert*, 325 Ga. App. 276, 750 S.E.2d 511 (2013).

Market Value Evidence

1. Determination of Market Value

Manager's authority and breach of responsibility created issues of fact. — Trial court did not err in denying a manager's motion for summary judgment as to the joint venturers' counterclaims for breach of contract and breach of the duty of good faith and fair dealing regarding its management of certain real estate because genuine issues of material fact existed as to whether the manager failed to meet the manager's contractual obligations to manage and control the business including acquiring, holding, maintaining, leasing, exchanging, and disposing of the properties owned. *Maree v. ROMAR Joint Venture*, 329 Ga. App. 282, 763 S.E.2d 899 (2014).

24-7-702. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law.

Law reviews. — For article, "Symposium on Evidence Reform: The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific Publications at Pretrial Daubert Hearings and at Trial," see 47 Ga. L. Rev. 837

(2013). For annual survey on product liability, see 65 Mercer L. Rev. 221 (2013). For annual survey on torts law, see 66 Mercer L. Rev. 189 (2014). For annual survey on trial practice and procedure, see 66 Mercer L. Rev. 211 (2014).

JUDICIAL DECISIONS

Interpretation of paragraph (c)(2).

— Georgia Supreme Court views the requirements of O.C.G.A. § 24-7-702 subparagraphs (c)(2)(A) and (c)(2)(B) as together being conjunctive with subparagraphs (c)(2)(C) and (c)(2)(D) and, thus, holds that, to be qualified to testify as an expert, the proffered witness must be a member of the same profession as the defendant whose conduct is at issue, or be a physician satisfying the supervision requirements of subparagraph (c)(2)(D). *Hankla v. Postell*, 293 Ga. 692, 749 S.E.2d 726 (2013).

No error in excluding expert testimony.

Trial court did not err in the court's determinations that plaintiffs' expert was not qualified to serve as an expert in the case and that the expert's opinions were not sufficiently reliable on the question of whether a gas company was negligent because the expert failed to cite any treatise or authority supporting the belief that, under readily ascertainable and verifiable standards recognized in the field, the gas company's actions in connection with the explosion fell below the standard

of care. *Anderson v. Atlanta Gas Light Co.*, 324 Ga. App. 801, 751 S.E.2d 589 (2013).

Standard for admissibility of expert testimony was governed by former O.C.G.A. § 24-9-67.1(b) (see now O.C.G.A. § 24-7-702), which provided if scientific, technical, or other specialized knowledge would assist the trier of fact in any cause of action to understand the evidence or to determine a fact in issue, a witness qualified as an expert may testify thereto in the form of an opinion or otherwise, if: (1) the testimony was based upon sufficient facts or data which were or will be admitted into evidence at the hearing or trial; (2) the testimony was the product of reliable principles and methods; and (3) the witness had applied the principles and methods reliably to the facts of the case. *Levine v. SunTrust Robinson Humphrey*, 321 Ga. App. 268, 740 S.E.2d 672 (2013) (decided under former O.C.G.A. § 24-9-67.1).

Qualification as an expert not satisfied.

Plaintiff's witness was not qualified to testify as an expert in a medical malpractice claim based on injuries and the death of an elderly patient because the witness was completely lacking in recent experience working with the type of patient at issue in the case since the witness never worked in a mental health unit or at any type of extended-stay facility housing elderly patients, and over the prior nine years, the witness had worked in neonatal or pediatric facilities, except for one year when the witness was working in intensive care units. *Sanders v. United States*, No. 109-164, 2011 U.S. Dist. LEXIS 155970 (S.D. Ga. Aug. 26, 2011).

Same profession requirement applies to medical experts. — Georgia Supreme Court construes the same profession requirement to apply to all proffered medical experts, even those experienced in the procedure at issue through active practice. *Hankla v. Postell*, 293 Ga. 692, 749 S.E.2d 726 (2013).

Appellate court properly held that a trial court abused the court's discretion by allowing an obstetrician/gynecologist to testify as an expert witness regarding a nurse midwife's treatment rendered to a patient because the obstetrician/gynecolo-

gist was neither a member of the same profession as the midwife nor supervised midwives as required under O.C.G.A. § 24-7-702. *Hankla v. Postell*, 293 Ga. 692, 749 S.E.2d 726 (2013).

Qualification requirements under O.C.G.A. § 24-7-702 do not apply to a defendant physician. — *Chadwick v. Brazell*, 331 Ga. App. 373, 771 S.E.2d 75 (2015).

Certified nurse midwife qualified to testify about standard of care for nurses. — In a medical malpractice case dealing with a child's permanent disabilities, the hospital's motion for a new trial was improperly granted on the ground that a certified nurse midwife (CNM) could not testify as to the standard of care exercised by the registered professional nurses (RN) because the CNM was a member of the same profession as the hospital's RNs because the Georgia Registered Professional Nurse Practice Act, O.C.G.A. § 43-26-1 et seq., required a CNM to be licensed as a RN, and both RNs and CNMs were regulated by the Georgia Board of Nursing; a review of the regulatory scheme revealed that a CNM was a RN who had advanced training in a specialized area; and the expert affidavit statute listed only nurses, and the statute did not have a separate listing for CNMs. *Dempsey v. Gwinnett Hosp. Sys.*, 330 Ga. App. 469, 765 S.E.2d 525 (2014).

Officer qualified as expert on gangs. — Police officer was properly qualified as an expert in gang identity and investigation as the officer was a state certified gang investigator; that the officer was trained in gang identity and investigation; that the officer trained new hires about gangs; and that the officer regularly monitored six Clayton County-based gangs, and was knowledgeable about the neighborhoods in which the gangs operated. The officer also testified that the officer knew the colors associated with the defendant's gang and had seen photographs of their gang signs. *Burgess v. State*, 292 Ga. 821, 742 S.E.2d 464 (2013).

Expert found not qualified to render opinion.

Since the plaintiff's witness was not qualified to testify as an expert in a medical malpractice claim based on injuries

and the death of an elderly patient, in any event, the witness was not competent to testify based upon the witness's sheer lack of knowledge regarding fall prevention because the witness never authored a falls policy and the witness's knowledge of those policies was strictly limited to the policy in effect at the witness's place of employment, the witness had no knowledge of the Morse Fall Scale, which was the method of fall risk assessment utilized in this case, prior to being retained, and the witness admitted in deposition that the witness did not rely on any textbooks or teachings to base the witness's opinions and that the witness performed no literary searches prior to forming the witness's opinion. *Sanders v. United States*, No. 109-164, 2011 U.S. Dist. LEXIS 155970 (S.D. Ga. Aug. 26, 2011).

Expert qualified. — Trial court erred in granting the doctor's motion in limine to exclude the testimony of the patient's expert on the grounds that the expert was not qualified to provide an expert opinion on hysteroscopic removal of fibroids and that the expert's testimony was speculative as the expert had significant experience in removing polyps through hysteroscopic procedures and the removal of fibroids via hysteroscopy was not markedly different from removal of polyps via that procedure. *Cartledge v. Montano*, 325 Ga. App. 322, 750 S.E.2d 772 (2013).

Expert allowed to testify.

In a case decided under former O.C.G.A. § 24-9-67.1, a doctor was properly qualified as an expert since the doctor acted as a consultant on the causation of pulmonary embolisms and consulted emergency room physicians about some of the patient's tests and researched the issue. *Bonds v. Nesbitt*, 322 Ga. App. 852, 747 S.E.2d 40 (2013) (decided under former O.C.G.A. § 24-9-67.1).

Trial court did not abuse the court's discretion by admitting the expert testimony proffered by the mortgagee because it was sufficient; competent evidence supported the finding that the foreclosure sale should be confirmed and provided proof of the true market value as of the date of the foreclosure sale. *Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC*, 325 Ga. App. 694, 754 S.E.2d 655 (2014).

Appraisal expert's testimony as to the value of foreclosed property at a confirmation proceeding did not violate former O.C.G.A. § 24-9-67.1(b) because the witness was certified as an appraiser in Georgia and had extensive experience, and the expert's conclusions as to the lot purchase agreement and buildability of certain lots were subject to cross-examination. The trial court, sitting without a jury, was not required to undertake a Daubert analysis of the expert's testimony. *Harper v. Ameris Bank*, 326 Ga. App. 67, 755 S.E.2d 872 (2014) (decided under former O.C.G.A. § 24-9-67.1).

In a suit arising out of a collision at a highway construction site, the trial court did not err in allowing the plaintiffs' expert testimony on human factors theories, which had been subject to publishing and peer review; however, the expert was not qualified to give an opinion regarding the placement of traffic control signs. *Ga. DOT v. Owens*, 330 Ga. App. 123, 766 S.E.2d 569 (2014).

Medical expert proper.

In a medical malpractice action, the trial court's order granting the defending doctor's motion to exclude the patient's expert witness testimony as the testimony related to the causation and permanence of the patient's erectile dysfunction based on a certain test was vacated because the order could be interpreted as requiring the exclusion of all the expert's opinion testimony as to the cause and permanence of the patient's erectile dysfunction. *Smith v. Rodillo*, 330 Ga. App. 365, 765 S.E.2d 432 (2014).

Business valuation expert should have testified. — In a negligence and breach of trust action, the special master erred by excluding the expert testimony regarding the value of the plaintiff because the expert undertook the exact type of analysis as all other valuation specialists utilize in valuing a business enterprise when public information is not available, and the opinion was relevant for the jury to determine, in conjunction with other testimony and evidence, the amount of damages that the defendant's alleged actions may have caused, which necessarily required consideration of opinion evidence as to the value of the business.

Levine v. SunTrust Robinson Humphrey, 321 Ga. App. 268, 740 S.E.2d 672 (2013) (decided under former O.C.G.A. § 24-9-67.1).

Cited in Young v. State, 328 Ga. App. 857, 763 S.E.2d 137 (2014); SJN Props., LLC v. Fulton County Bd. of Assessors, 296 Ga. 793, 770 S.E.2d 832 (2015).

24-7-703. Bases of expert opinion testimony.

JUDICIAL DECISIONS

Medical expert proper. — In a medical malpractice action, the trial court’s order granting the defending doctor’s motion to exclude the patient’s expert witness testimony as the testimony related to the causation and permanence of the patient’s erectile dysfunction based on a cer-

tain test was vacated because the order could be interpreted as requiring the exclusion of all the expert’s opinion testimony as to the cause and permanence of the patient’s erectile dysfunction. Smith v. Rodillo, 330 Ga. App. 365, 765 S.E.2d 432 (2014).

24-7-704. Ultimate issue opinion.

JUDICIAL DECISIONS

Cited in State v. Cooper, 324 Ga. App. 32, 749 S.E.2d 35 (2013).

24-7-707. Expert opinion testimony in criminal proceedings.

Law reviews. — For article, “Symposium on Evidence Reform: A Tale of Two Dauberts,” see 47 Ga. L. Rev. 889 (2013).

JUDICIAL DECISIONS

ANALYSIS

QUALIFICATION AS EXPERT

ILLUSTRATIONS

1. OPINIONS ADMISSIBLE
3. WITNESS QUALIFIED AS EXPERT

Qualification as Expert

Qualification as expert satisfied.

Trial court did not abuse the court’s discretion in qualifying a witness as an expert in commercial sexual exploitation of children as the witness testified that the witness was the director of forensic services at the Georgia Center for Child Advocacy; had conducted over one thousand forensic interviews; had been qualified as a forensic-interview expert approximately 46 times; had undergone training for mental health providers in the area of commercial sexual exploitation of children and become a facilitator to train others on

the topic; and had attended symposiums and seminars with instruction from the Federal Bureau of Investigation on how to work with sexually exploited children. Pepe-Frazier v. State, 331 Ga. App. 263, 770 S.E.2d 654 (2015).

Trial court did not abuse the court’s discretion in qualifying a witness as an expert in pimping culture, terminology, and relationship dynamics between pimps and prostitutes because the witness testified that the witness was the director of forensic services for Fulton County, Georgia; worked with various law enforcement agencies in Georgia to train them in un-

derstanding cycles of abuse regarding sexual exploitation; had trained with the National Center for Missing and Exploited Children to study the effects of sexual exploitation, exploring the dynamics between demeanor of pimps and exploited teenagers; and had studied pimping and prostitution by extensive review of scholarly literature on the subject. *Pepe-Frazier v. State*, 331 Ga. App. 263, 770 S.E.2d 654 (2015).

Illustrations

1. Opinions Admissible

Child abuse accommodation syndrome. — Expert testimony by a licensed psychologist regarding child abuse accommodation syndrome was properly admitted because the expert testified regarding how the victim’s demeanor was consistent with having been sexually abused and not whether the victim was telling the truth. *Haithcock v. State*, 320 Ga. App. 886, 740 S.E.2d 806 (2013).

Officer is an expert on narcotics investigations.

Trial court did not abuse the court’s discretion during the defendant’s trial for possession of cocaine with the intent to distribute in allowing the arresting officer to testify as an expert witness on the issue of the defendant’s intent to distribute crack cocaine because the officer had over

900 hours of specialized training as a narcotics officer, was familiar with how crack cocaine was typically packaged and sold, and had made numerous drug-related arrests, at least 50 of which involved crack cocaine. Further, the officer’s testimony was relevant to the issue of whether the defendant possessed the cocaine with the intent to distribute the cocaine and was within the scope of the officer’s expertise. *Thomas v. State*, 321 Ga. App. 214, 741 S.E.2d 298 (2013).

3. Witness Qualified as Expert

Forensic analyst of telephone records. — Trial court did not abuse the court’s discretion in qualifying the forensic analyst as an expert or in admitting the forensic analyst’s testimony regarding the telephone calls between those involved in the drug transactions because the forensic analyst was examined extensively on specific training as an analyst of telephone records and the specialized computer programs used in law enforcement data compilation, and because the correlation and analysis of large numbers of cellular telephone calls, using specialized computer programs and other tools and resources specific to forensic analysis, was a matter beyond the ken of the average layperson. *Maldonado v. State*, 325 Ga. App. 41, 752 S.E.2d 112 (2013).

CHAPTER 8

HEARSAY

ARTICLE 1

GENERAL PROVISIONS

24-8-801. Definitions.

Law reviews. — For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

ADMISSIBILITY

1. IN GENERAL
2. ORIGINAL EVIDENCE

ADMISSIONS AND CONFESSIONS

2. ADMISSIONS OF PARTIES TO RECORD
 - b. PARTIES

DECLARATIONS OF CONSPIRATORS

2. APPLICATION
3. CONSPIRACY DEFINED
 - b. PROOF OF CONSPIRACY
4. PENDENCY OF CRIMINAL PROJECT
 - a. IN GENERAL

General Consideration

Evidence not offered to prove truth of matter asserted.

In a felony murder while in the commission of aggravated battery in connection with the death of a child conviction, the detective's testimony about the communication with the pediatric hospital doctors regarding their beliefs that the child's injuries were not the result of an accident was not improperly admitted into evidence because the testimony was not offered for its truth that the fatal injuries were not the result of accident; because the cause of death was not the ultimate issue for the jury to determine; and because, even assuming that the testimony was hearsay and improperly admitted, the testimony was merely cumulative of other properly admitted evidence, and, thus, it was highly probable that the testimony's admission did not affect the outcome at trial. *Dyer v. State*, 295 Ga. 173, 758 S.E.2d 301 (2014) (decided under former O.C.G.A. § 24-3-1(a)).

Statements made by the declarants themselves are not hearsay. *C & R Fin. Lenders, LLC v. State Bank & Trust Co.*, 320 Ga. App. 660, 740 S.E.2d 371 (2013).

Latent fingerprint card not hearsay. — Trial court did not err in overruling defendant's hearsay objection to the entry into evidence of a latent fingerprint card, which was identified by an officer other than the one who took the impression, because the card at issue simply showed an image of part of a window with

fingerprints thereon, and it did not contain any representations or conclusions of a third party; thus, neither the testimony of the officer, nor the latent fingerprint card, was hearsay. *Bates v. State*, 322 Ga. App. 319, 744 S.E.2d 841 (2013).

Cited in *Ryans v. State*, 293 Ga. 238, 744 S.E.2d 759 (2013); *Carter v. State*, 324 Ga. App. 118, 749 S.E.2d 404 (2013); *McNair v. State*, 330 Ga. App. 478, 767 S.E.2d 290 (2014); *Parker v. State*, 296 Ga. 586, 769 S.E.2d 329 (2015); *Graham v. State*, 331 Ga. App. 36, 769 S.E.2d 753 (2015).

Admissibility

1. In General

Prior inconsistent statement of detective. — In a claim that the employer procured the employee's false imprisonment when the employee was arrested by a detective, although the employee offered the employee's report of the detective's question to a loss prevention officer for the employer about what to do with the employee after the employee arrived at the police station to show the truth of the matter asserted — that was, that the employer had some substantial control over the police investigation — the detective's question as reported by the employee was admissible at trial as an inconsistent statement made prior to the detective's later testimony that the detective never asked the question at all. *Smith v. Wal-Mart Stores E.*, No. A14A1373,

2014 Ga. App. LEXIS 812 (Nov. 21, 2014).

2. Original Evidence

Fact within witness's personal knowledge. — Questions to a witness as to whether witness had been indicted by a grand jury for the shooting for which defendant was being tried and whether the grand jury had declined to indict witness did not elicit hearsay because the questions asked for facts that were within the witness's personal knowledge. *Bell v. State*, 294 Ga. 443, 754 S.E.2d 327 (2014).

Testimony as to identification.

Even if one officer's testimony that a witness identified the defendant as the person who had burglarized the shop where the witness worked six days earlier was hearsay under former O.C.G.A. § 24-3-2 (see now O.C.G.A. § 24-8-801), it was admissible, as the witness testified and was cross-examined about the identification of the defendant as the shop's burglar. *Williams v. State*, 327 Ga. App. 283, 758 S.E.2d 620 (2014) (decided under former O.C.G.A. § 24-3-2).

Hearsay issue critical in medical malpractice case. — In a medical malpractice case, the trial court committed reversible error by finding that the patient waived a hearsay objection as to a defense pathologist's deposition testimony because the patient had the right to object to the testimony at trial and the testimony was inadmissible hearsay entitling the patient to a new trial since it was not harmless error in that it was critical in the case because the evidence directly addressed the core disputed issue of whether the clinic's neurosurgeon left an excessive amount of cotton in the patient's brain. *Thomas v. Emory Clinic, Inc.*, 321 Ga. App. 457, 739 S.E.2d 138 (2013).

Admissions and Confessions

2. Admissions of Parties to Record

b. Parties

Statement of employee nurse of defendant. — Trial court did not abuse the court's discretion in admitting the testimony of the plaintiff's daughter over the defendant's objection as an admission by a

party opponent because the statement was made by a nurse employed by the defendant and was relevant to the slip and fall case. *Emory Healthcare, Inc. v. Pardue*, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

Declarations of Conspirators

2. Application

Declarations of coconspirator admissible.

Testimony by the second defendant's girlfriend that the second defendant told the girlfriend that the first defendant had shot a man while the defendants were breaking into cars was admissible under the co-conspirator exception to the hearsay rule. *Billings v. State*, 293 Ga. 99, 745 S.E.2d 583 (2013).

Trial court did not err in allowing into evidence a co-conspirator's hearsay testimony regarding the statement that the defendant made about having to do something just before the murder because the statement was properly admitted into evidence as a declaration against the defendant from a co-conspirator involved in the murder. *Folston v. State*, 294 Ga. 778, 755 S.E.2d 803 (2014).

Statements coindictive made to another person in an audiotaped conversation were admissible under former O.C.G.A. § 24-3-5 because the statements were made after the shooting and while the identity of those complicit therein were still being concealed. *Hassel v. State*, 294 Ga. 834, 755 S.E.2d 134 (2014) (decided under former O.C.G.A. § 24-3-5).

Overheard statement of a defendant's coconspirator as the two planned to "hit a lick" and, later, the coconspirator's statement to a girlfriend that the "lick went bad" were both properly admitted under the coconspirator exception to the hearsay rule, former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801(d)(2)(E)); furthermore, because the statements were not testimonial, the confrontation clause was not violated. *Favors v. State*, 770 S.E.2d 851, No. S14A1797, 2015 Ga. LEXIS 196 (2015).

Because the conspiracy set forth in the indictment involved traveling between two apartment complexes for criminal

Declarations of Conspirators (Cont'd)
2. Application (Cont'd)

purposes, a co-conspirator’s statement to a witness that the co-conspirator saw the defendant walking out of the woods just after hearing a gun shot was admissible. *Grissom v. State*, 296 Ga. 406, 768 S.E.2d 494 (2015).

3. Conspiracy Defined
b. Proof of Conspiracy

Statement made prior to formation of conspiracy. — Trial court did not err in admitting testimony of a coconspirator about a second coconspirator’s statements to another regarding a plan to steal money from a house with the help of friends, including the defendant, as the statement was admissible under former O.C.G.A. § 24-3-5 (see now O.C.G.A. § 24-8-801(d)(2)(E)), even if the statement was made prior to the formation of the conspiracy. *Peoples v. State*, 295 Ga. 44, 757 S.E.2d 646 (2014) (decided under former O.C.G.A. § 24-3-5).

4. Pendency of Criminal Project
a. In General

Declarations during concealment admissible.
Argument that the co-indictee’s statements to a cell mate were not made during the concealment phase of the conspiracy

was without merit as the concealment phase was ongoing because the co-indictee’s statements were not made to police, the investigation was ongoing, and the other conspirators were still at-large; thus, the co-indictee’s statements to the cell mate were admissible. *Grimes v. State*, 296 Ga. 337, 766 S.E.2d 72 (2014).
Declarations made in furtherance of conspiracy admissible. — Based on the detective’s testimony that the co-indictee’s cell mate never told the police that the co-indictee had sent the cell mate to talk to the police, it was not clearly erroneous for the trial court to conclude that the cell mate was not sent by the co-indictee to talk to the police; the argument that the co-indictee’s statements were not in the furtherance of a conspiracy because they were made with the intent that they be communicated to authorities was without merit; and the co-indictee’s statements to the cell mate were admissible. *Grimes v. State*, 296 Ga. 337, 766 S.E.2d 72 (2014).
Telephone calls in furtherance of conspiracy. — Trial court did not err when the court admitted the transcripts of phone calls between the defendant and the co-conspirators because such evidence did not constitute hearsay as the statements fell under the exception to the hearsay rule under O.C.G.A. § 24-8-801(d)(2)(E) given that the statements over the telephone were made in furtherance of the conspiracy. *Hernandez-Garcia v. State*, 322 Ga. App. 455, 745 S.E.2d 706 (2013).

24-8-802. Hearsay rule.

JUDICIAL DECISIONS

ANALYSIS

OBJECTIONS

2. ADMISSION OVER OBJECTION

Objections

2. Admission over Objection

Failure to object to hearsay. — In a plumbing company’s action to recover for septic services performed, the company failed to object to the homeowners’ affida-

vits supporting the homeowners’ defense of fraud by the company and, therefore, the company waived any objection to any alleged hearsay under O.C.G.A. § 24-8-802. *Shuford v. Aames Plumbing & Heating, Inc.*, 327 Ga. App. 844, 761 S.E.2d 395 (2014).

24-8-803. Hearsay rule exceptions; availability of declarant im-
material.

Law reviews. — For article, “Symposium on Evidence Reform: The Curious Case of Differing Literary Emphases: The Contrast Between the Use of Scientific Publications at Pretrial Daubert Hearings and at Trial,” see 47 Ga. L. Rev. 837 (2013). For annual survey on evidence, see 65 Mercer L. Rev. 125 (2013).

JUDICIAL DECISIONS

ANALYSIS

RES GESTAE; PRESENT SENSE IMPRESSION AND EXCITED UTTERANCE

- 3. SPONTANEITY
- 6. APPLICATION AND EXAMPLES
 - i. CRIMINAL LAW — VICTIMS

BUSINESS RECORDS

- 2. PROCEDURAL CONSIDERATIONS
 - a. FOUNDATION FOR ADMISSION
- 3. APPLICATIONS AND ILLUSTRATIONS

INTEREST IN PROPERTY

- 3. ADMISSIBILITY OF RECORDED INSTRUMENT

Res Gestae; Present Sense
Impression and Excited Utterance

3. Spontaneity

Excited utterance.

Out-of-court statements identifying the appellant as the man who beat the witness’s stepson did not appear to be the most probative evidence to establish the appellant’s identity as the killer because the witness’s spouse testified directly to that same fact, but the statements were properly admitted under the hearsay exception for excited utterances since the statements were made just minutes after the stepson had been brutally attacked. *Wilson v. State*, 295 Ga. 84, 757 S.E.2d 825 (2014).

6. Application and Examples

i. Criminal Law — Victims

Statement shortly after crime occurred.

Because the victim’s statements to the homeowner’s daughter and the emergency medical technician (EMT) were made shortly after the rape occurred and were admissible as part of the res gestae, any objection to the testimony of the homeowner’s daughter and the EMT regarding what the victim said to them would have

been futile and could not provide the basis for an ineffective assistance claim. *Miller v. State*, 325 Ga. App. 764, 754 S.E.2d 804 (2014) (decided under former O.C.G.A. § 24-3-3).

Audiotape of 9-1-1 calls.

Because the entirety of both of the victim’s 9-1-1 calls took place while the victim was perceiving the danger posed to the victim by the defendant, and because the victim only ended the second 9-1-1 call when the officers arrived on the scene and the victim only then perceived that the most immediate danger had passed, the circumstances suggested that the victim was responding throughout the incident to the victim’s reasonable perception of a real and present danger, and the trial court did not abuse the court’s discretion when the court concluded that the victim’s 9-1-1 calls were admissible under the present-sense impression exception to the hearsay rule. *Owens v. State*, 329 Ga. App. 455, 765 S.E.2d 653 (2014).

Testimony of officer.

Pretermitted whether the testimony of the sheriff’s deputy and police investigator fell within the res gestae exception to hearsay, because the defendant could not show any prejudice resulting from the admission of the testimony in light of the properly admitted testimony of the home-

Res Gestae; Present Sense Impression and Excited Utterance (Cont'd)
6. Application and Examples (Cont'd)
i. Criminal Law — Victims (Cont'd)

owner's daughter and emergency medical technician, the failure to object to evidence which was merely cumulative of other admissible evidence did not amount to ineffective assistance of counsel. *Miller v. State*, 325 Ga. App. 764, 754 S.E.2d 804 (2014) (decided under former O.C.G.A. § 24-3-3).

Business Records

2. Procedural Considerations

a. Foundation for Admission

Authentication required.

Trial court erred by granting summary judgment to a condominium association for past due sums because the only evidence offered to support those claims, namely an account ledger and an affidavit with unsupported testimony from the property manager regarding the amounts owed, was inadmissible hearsay; thus, the damages sought were not sufficiently certain. *Hayek v. Chastain Park Condo. Ass'n*, 329 Ga. App. 164, 764 S.E.2d 183 (2014).

Proper foundation found.

Trial court properly admitted the bank's loan history report as a business record because the report provided a description of each transaction relating to the estate's loan from the loan's inception, along with a corresponding posting date for each transaction, the transaction amount, and any change to the principal balance resulting from the transaction, and was not a summary. *Roberts v. Cmty. & S. Bank*, 331 Ga. App. 364, 771 S.E.2d 68 (2015).

3. Applications and Illustrations

Business records of predecessor entity. — Attorney-in-fact for the entity serving as manager of a lender's assignee could authenticate the business records of the lender and the assignee in support of an action to collect on three promissory notes, pursuant to O.C.G.A. § 24-8-803(6); however, as to the third

note, the affidavit failed to attach the payment history, and that claim failed. *Ware v. Multibank 2009-1 RES-ADC Venture, LLC*, 327 Ga. App. 245, 758 S.E.2d 145 (2014).

Records of debtor's account. — In a creditor's action on open account, the creditor's business records showing the debtor's account and bank records showing wire transfers made by the debtor were sufficient under O.C.G.A. § 24-8-803(6) to support its contention that it was entitled to summary judgment as to the debtor's liability; because of inconsistencies, however, further proceedings were required to determine the amount the debtor owed. *SKC, Inc. v. eMag Solutions, LLC*, 326 Ga. App. 798, 755 S.E.2d 298 (2014).

Cell phone records were properly admitted under former O.C.G.A. § 24-3-14(b) after the records custodian testified that one of the records at issue listed the locations of all the company's cell phone towers during a span that included the date of the crimes and the other records showed the incoming and outgoing calls for the defendant's cell phone. *Kilgore v. State*, 295 Ga. 729, 763 S.E.2d 685 (2014) (decided under former O.C.G.A. § 24-3-14).

Credit agreement and statements.

Trial court did not err by allowing into evidence as business records two spreadsheets regarding the alleged transactions supporting the defendant's convictions for theft by taking because the documents were created as part of the ordinary course of business and a proper foundation was laid for their admission. *Raymond v. State*, 322 Ga. App. 404, 745 S.E.2d 689 (2013) (decided under former O.C.G.A. § 24-3-14).

Interest in Property

3. Admissibility of Recorded Instrument

Uses of recorded deed. — In a suit asserting trespass, ejectment, and other claims, the adjoining property owner failed to object to the use of the recorded deeds and easement by the trial court under the hearsay exception of O.C.G.A. § 24-8-803(14); thus, the issue was

waived on appeal. *Amah v. Whitefield Acad., Inc.*, 331 Ga. App. 258, 770 S.E.2d 650 (2015).

24-8-804. Hearsay rule exceptions; declarant unavailable.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
DECLARATIONS AGAINST INTEREST
1. DECEASED PERSONS

General Consideration

Applicability of new rule on retrial. — Because the new evidence statute regarding the unavailability of a witness based on a defendant’s engaging or acquiescing in wrongdoing is a procedural statute and would apply to a retrial, even if the trial court erroneously admitted testimonial and non-testimonial hearsay under the prior evidence code, the same evidence would be properly admitted at a second trial due to a procedural change in the laws of evidence. *Brittain v. State*, 329 Ga. App. 689, 766 S.E.2d 106 (2014).

Declarations Against Interest

1. Deceased Persons

Declarations held properly admitted.

Victim’s non-verbal statements to the victim’s sibling and the victim’s wife were admissible as dying declarations under former O.C.G.A. § 24-3-6 as the victim was conscious of the victim’s dire condition at the time the victim made the non-verbal statements inculcating the defendant as the shooter as the victim prayed with the victim’s spouse for forgiveness and died a few days later due to complications related to the multiple serious injuries. *Wiggins v. State*, 295 Ga. 684, 763 S.E.2d 484 (2014) (decided under former O.C.G.A. § 24-3-6).

24-8-806. Attacking and supporting credibility of a declarant.

JUDICIAL DECISIONS

Prior inconsistent statement. — Trial court did not err in admitting extrinsic evidence of the cousin’s prior inconsistent statements because the state complied with the prerequisites of O.C.G.A. § 24-6-613(b) as both the prosecutor and defense counsel examined the witness as

to each of the prior inconsistent statements and the witness was afforded an opportunity to explain or to deny the prior inconsistent statements, which entitled the prosecutor to ask leading questions. *McNair v. State*, 330 Ga. App. 478, 767 S.E.2d 290 (2014).

24-8-807. Residual exception.

JUDICIAL DECISIONS

Admission of necessity.
Testimony of the victim’s sons and a coworker as to the statements the victim

made regarding the victim’s relationship with the defendant were admissible under the necessity exception to the hearsay rule

as the victim enjoyed a close relationship with the victim's sons and routinely discussed personal issues with the coworker, and the statements were the only evidence of the victim's longstanding intention to leave the defendant. *Faircloth v. State*, 293 Ga. 134, 744 S.E.2d 52 (2013).

Trial court did not err by admitting the testimony of the victim's wife under the necessity exception of O.C.G.A. § 24-8-807 as defense counsel was permitted to recross-examine the witness to challenge the reliability of the victim's out-of-court statement and even if it were error to have admitted the wife's testimony concerning the victim's out-of-court statement about a previous fight with the defendant over a drug debt, the Supreme Court of Georgia found that it was highly probable that the error did not contribute to the judgment since it was merely cumulative of other evidence. *Bulloch v. State*, 293 Ga. 179, 744 S.E.2d 763 (2013).

Hearsay statements by a murder victim were necessary, etc.

Trial court did not err in admitting hearsay statements made by the deceased victim to a girlfriend in two cell phone calls at the time of the victim's murder based on their long acquaintance (10 years) and the fact they had been living together for 11 months, under the necessity exception to the hearsay rule. *Taylor v. State*, 296 Ga. 761, 770 S.E.2d 805 (2015).

Statements of deceased witness admitted.

Under former O.C.G.A. § 24-3-1, testimony by the victim's husband about a conversation with the victim just prior to the crime was admissible because the victim was deceased, the statements about who was present in the store immediately before the victim's death were relevant, and the statement was trustworthy, having been made to the victim's husband, with whom the victim often spoke daily about matters at the store. *Johnson v. State*, 294 Ga. 86, 750 S.E.2d 347 (2013) (decided under former O.C.G.A. § 24-3-1).

Requirements of necessity and guaranty of trustworthiness satisfied.

Trial court did not err in allowing the victim's cousin and the cousin's girlfriend

to testify at trial about prior difficulties between the victim and the defendant pursuant to the necessity exception to the rule excluding hearsay, and the testimony did not violate the defendant's right to confrontation, because the trial court concluded the proffered testimony of the witnesses was reliable and trustworthy as it found the victim was like a sibling to the witnesses, and because any alleged harm from the admission of that testimony was mitigated by the fact that both witnesses testified the victim and the defendant continued to be friends in spite of their prior difficulties. *Thompson v. State*, 294 Ga. 693, 755 S.E.2d 713 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

Statements failed to meet necessity exception.

Out-of-court statements identifying the appellant as the man who beat the witness's stepson did not appear to be the most probative evidence to establish the appellant's identity as the killer because the witness's spouse testified directly to that same fact, but the statements were properly admitted under the hearsay exception for excited utterances since the statements were made just minutes after the stepson had been brutally attacked. *Wilson v. State*, 295 Ga. 84, 757 S.E.2d 825 (2014).

Trial court did not abuse the court's discretion in ruling that the police reports about the three separate incidents of violence allegedly committed by the co-indictee in Baltimore in 1998 were inadmissible under the necessity exception to the hearsay rule because, even assuming that the authors of the police reports and the victims and witnesses whose statements were recounted in two of the reports were all outside Georgia and thus unavailable, the defendants failed to establish the necessary guarantees of trustworthiness as the only information about violent acts contained in the police reports of the first two incidents was double hearsay, and there was no reliable evidence that the co-indictee was the person identified in the police reports. *Brown v. State*, 295 Ga. 804, 764 S.E.2d 376 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

Trial court did not err in excluding a witness's hearsay statement under the

necessity exception to the hearsay rule because the witness’s statement was not the only evidence that could establish that the co-indictee’s gun was actually capable of firing as two eyewitnesses testified that the witnesses believed the co-indictee actually fired shots, and the witness’s state-

ment did not prove that the co-indictee’s gun was capable of firing because the witness never said that the witness saw the gun fire. *Brown v. State*, 295 Ga. 804, 764 S.E.2d 376 (2014) (decided under former O.C.G.A. § 24-3-1(b)).

ARTICLE 2

ADMISSIONS AND CONFESSIONS

24-8-820. Testimony as to child’s description of sexual contact or physical abuse.

Law reviews. — For article, “Appeal and Error: Appeal or Certiorari by State in Criminal Cases,” see 30 Ga. St. U.L. Rev. 17 (2013).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION

General Consideration

Viewing of video during deliberations. — Trial court did not err in permitting the jury to view the video tape of the victim’s forensic interview as the jury was entitled to consider the victim’s out-of-court statements as substantive evidence under the Child Hearsay Statute, former O.C.G.A. § 24-3-16. *State v. Martinez-Palomino*, 329 Ga. App. 304, 764 S.E.2d 886 (2014) (decided under former O.C.G.A. § 24-3-16).

Application

Cumulative testimony concerning victim’s statements held harmless error.
Habeas court properly denied the appel-

lant relief based on ineffective assistance because the appellant did not question appellate counsel regarding that allegation and so there was no record of why appellate counsel did not pursue the specific issue at the motion for new trial stage or on direct appeal; plus, the habeas court resolved the allegation by determining the admission of the child’s videotaped forensic interview was harmless because it was cumulative of the child’s trial testimony. *Cobb v. Hart*, 295 Ga. 89, 757 S.E.2d 840 (2014) (decided under former O.C.G.A. § 24-3-16).

24-8-821. Admissions in pleadings.

JUDICIAL DECISIONS

Admissions of fact in the pleadings can always be taken advantage of, etc.

Mesothelioma plaintiff’s allegations in the plaintiff’s complaint that the plaintiff was exposed to asbestos manufactured or distributed by numerous companies were admissible as admissions in judicio under O.C.G.A. § 24-8-821, even when withdrawn, and the manufacturers remaining in the suit could use these admissions as evidence that fault should be apportioned. *Georgia-Pacific, LLC v. Fields*, 293 Ga. 499, 748 S.E.2d 407 (2013).

Rule only applies to factual admissions.

Doctor’s withdrawn admission that the doctor executed the guaranty did not create a genuine issue of material fact as to whether the doctor was personally bound by it as the doctor’s withdrawn admission that the doctor guaranteed payment of all sums owing under the lease was only an opinion or conclusion as to the legal effect of that instrument and could not be used to the lessor’s advantage. *Citrus Tower Blvd. Imaging Ctr. v. David S. Owens, MD, PC*, 325 Ga. App. 1, 752 S.E.2d 74 (2013).

Cannot take judicial notice of matters subject to proof. — Trial court did

not err in denying the defendant’s request to take judicial notice of certain findings of fact and conclusions of law made by the trial court in the portion of the court’s order granting the defendant’s summary judgment motion regarding the plaintiff’s premises liability claim because the trial court could not take judicial notice of matters that were the subject of proof in the case. *Emory Healthcare, Inc. v. Pardue*, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

Admissions in brief used to find contempt. — In a child custody dispute and contempt proceeding arising out of the parent’s refusal to participate in a court-ordered custody evaluation, the trial judge could find the parent in contempt based on the parent’s response to the motion in which the parent expressly defied the evaluation order and declared to be justified in refusing to sign the required documents. *Murphy v. Murphy*, 330 Ga. App. 169, 767 S.E.2d 789 (2014).

Cited in *Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC*, 325 Ga. App. 694, 754 S.E.2d 655 (2014); *First Citizens Bank & Trust, Inc. v. Ruddell*, 330 Ga. App. 82, 766 S.E.2d 538 (2014).

24-8-824. Only voluntary confessions admissible.

JUDICIAL DECISIONS

ANALYSIS

- VOLUNTARINESS
- PROCEDURAL CONSIDERATIONS
3. INSTRUCTIONS
4. REVIEW

Voluntariness

Hope of benefit not created by explanation of consecutive and concurrent sentences. — Trial court did not err in denying the defendant’s motion to exclude the defendant’s statement as being

induced by hope of benefit because the investigator’s explanation of consecutive versus concurrent sentences and the options available to the district attorney’s office merely emphasized the seriousness of the charges and amounted to no more

than a permissible admonition to tell the truth. *Lane v. State*, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

Hope of benefit not created.

Defendant's motion to suppress several statements made to the investigators was properly denied because the assurances made to the defendant, that the defendant could go home if the defendant told the truth and that investigators had no intention of charging the defendant, did not amount to a "hope of benefit" rendering the statements involuntary. *Edenfield v. State*, 293 Ga. 370, 744 S.E.2d 738 (2013) (decided under former O.C.G.A. §§ 24-3-50 and 24-3-51).

Trial court erred in suppressing the defendant's custodial statement pursuant to former O.C.G.A. § 24-3-50 because it was not induced by a "hope of benefit" promised from the state; the defendant's statement was not actually induced by a belief that the defendant would not be charged with forcible rape, not be thrown in jail, and not have to register as a sex offender if the defendant confessed to having sex with the victim. *State v. Munoz*, 324 Ga. App. 386, 749 S.E.2d 48 (2013) (decided under former O.C.G.A. § 24-3-50).

Officer did not improperly induce the defendant's custodial statement when, in response to the defendant's plea to "help me out," the detective stated: "All right. What I've got to do before I can talk to you is read you your rights, OK?" This statement was not a promise that rendered the defendant's statement involuntary under O.C.G.A. § 24-8-824. *Wilson v. State*, 293 Ga. 508, 748 S.E.2d 385 (2013).

In defendant's felony murder trial, the defendant's statement to police was admissible because the sheriff's statement that no one was going to come after the defendant for getting rid of a dead body the defendant found in the defendant's home and that the most the defendant could be charged with would be disposing of a body was merely an exhortation to tell the truth and not a promise of benefit under O.C.G.A. § 24-8-824. *Currier v. State*, 294 Ga. 392, 754 S.E.2d 17 (2014).

Record did not support the defendant's claim that the defendant's confession was induced by the hope of benefit as the

detective denied promising anything to the defendant and the officers' comments regarding punishment amounted to explanation of the seriousness of the situation and admonitions to tell the truth. *Lucas v. State*, 331 Ga. App. 455, 771 S.E.2d 142 (2015).

The fact that the defendant might have hoped the police would offer the defendant something more if the defendant confessed did not render the statement inadmissible as the detective did not make an offer of a hope of benefit. *Eason v. State*, 331 Ga. App. 59, 769 S.E.2d 772 (2015).

Defendant's statements to police were voluntary and properly admitted at trial because none of the interview techniques utilized by the interrogating officers were impermissible; there was no evidence that the officers ever offered the defendant any leniency in charges or sentencing such as would amount to an improper hope of benefit; and there was no evidence of excessively lengthy interrogation, physical deprivation, brutality, or other such hallmarks of coercive police activity. *Drake v. State*, 296 Ga. 286, 766 S.E.2d 447 (2014) (decided under former O.C.G.A. § 24-3-50).

Defendant's custodial statements were voluntary and admissible, although the defendant was only 19, the defendant was held in isolation for over an hour prior to being read the defendant's rights, and the defendant was videotaped while the defendant waited. Giving the defendant water and a cigarette was not a "hope of benefit" that prevented the confession from being admissible. *Browner v. State*, 296 Ga. 138, 765 S.E.2d 348 (2014) (decided under former O.C.G.A. § 24-3-50).

Statements neither coerced nor hope induced.

Trial court did not err in admitting the defendant's statements because the statements were voluntary as the officer did not tell the defendant that the defendant could not leave until the officer heard what the officer wanted, and the detective's statements that the defendant's friend and mother could be arrested if the evidence showed they were involved in the crime were mere truisms or recounting of facts rather than a threat of injury or promise of benefit. *Moore v. State*, 325 Ga.

Voluntariness (Cont'd)

App. 749, 754 S.E.2d 792 (2014) (decided under former O.C.G.A. § 24-3-50).

Hope of lighter punishment, induced by other person, is usually “hope of benefit”, etc.

Trial court did not err in finding that a portion of the defendant’s police interview was inadmissible because it was induced by an officer’s statement that “the person that cooperates is the person that gets help,” made after the defendant and two accomplices were arrested, and the statement indicated that if the defendant cooperated truthfully, the defendant would get a lighter sentence than the accomplices. *State v. Robinson*, 326 Ga. App. 63, 755 S.E.2d 869 (2014).

Withholding medical attention from defendant, etc.

Officer’s statement that the defendant would not be taken to jail if the defendant submitted to a drug recognition examination did not amount to an improper hope of benefit in violation of former O.C.G.A. § 24-3-50 and, thus, the trial court did not err in failing to suppress evidence of the drug recognition exam. *Edison v. State*, 327 Ga. App. 366, 759 S.E.2d 247 (2014) (decided under former O.C.G.A. § 24-3-50).

Defendant was not in custody for purposes of Miranda, etc.

In action decided under former O.C.G.A. § 24-3-50, a detective’s false claim that the defendant’s DNA was found on the brass knuckles did not affect the admissibility of the defendant’s confession, made after the defendant knowingly and voluntarily waived Miranda rights. *Johnson v. State*, 295 Ga. 421, 761 S.E.2d 13 (2014) (decided under former O.C.G.A. § 24-3-50).

Defendant’s statement was not involuntary, etc.

Defendant’s statements during a second

interview with police were voluntary and admissible as the investigator’s statements did not concern a charge or sentence facing the defendant and did not constitute physical or mental torture. *Turner v. State*, 296 Ga. 394, 768 S.E.2d 458 (2015) (decided under former O.C.G.A. § 24-3-50).

Procedural Considerations**3. Instructions**

Jury instruction not applicable to testimony of witness other than defendant. — Trial court did not err by denying the defendant’s request to instruct the jury regarding the voluntariness of an eyewitness’s prior inconsistent statement to police in which the eyewitness, the defendant’s girlfriend, implicated the defendant in the victim’s murder because the charge requested was based on a statute regarding the admissibility of a confession; and the charge requested was not applicable to the testimony of a witness other than the defendant. *Poellnitz v. State*, 296 Ga. 134, 765 S.E.2d 343 (2014) (decided under former O.C.G.A. § 24-3-50).

4. Review

Ineffective assistance of counsel for failing to suppress statements to detectives. — Trial counsel did not provide ineffective assistance by not moving to suppress incriminating statements that the defendant made to detectives at the defendant’s house because the defendant did not show, inter alia, a reasonable probability that the outcome of the trial would have been different had the statements been suppressed based on the other incriminating evidence against the defendant. *Lucas v. State*, 328 Ga. App. 741, 760 S.E.2d 257 (2014).

CHAPTER 9

AUTHENTICATION AND IDENTIFICATION

ARTICLE 1

GENERAL PROVISIONS

24-9-901. Requirement of authentication or identification.

JUDICIAL DECISIONS

ANALYSIS

PROOF OF AUTHENTICITY OF WRITING

AUTHENTICATION BY NONEXPERT WITNESSES

Proof of Authenticity of Writing

Consideration of print out of e-mail. — Trial court’s evidentiary ruling was reversed because the trial court failed to exercise the court’s discretion in ruling on the admissibility of Exhibit 3, a print-out of an e-mail regarding the terms of the lease, as the record showed that the trial court failed to consider the wide variety of means by which the guarantor could authenticate the writing, including that the trial court refused to consider circumstantial evidence of its authenticity such as the appearance, contents, and substance of the document, and the fact that the lessor produced the document in response to the guarantor’s discovery requests. Koules v. SP5 Atl. Retail Ventures, 330 Ga. App. 282, 767 S.E.2d 40 (2014).

Loan documents properly authenticated. — Limited liability company and its individual members were properly held liable to a bank following their failure

because there was ample undisputed evidence that the bank was the company’s successor-in-interest under the credit line agreements as various documents allowed judicial notice that the bank had acquired the company’s assets and the loan documents were properly authenticated. Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

Authentication by Nonexpert Witnesses

Basis for testimony of nonexpert witness.

Although the witnesses to a will were deceased, the lawyer who prepared the will and the lawyer’s paralegal were not permitted to testify that the signature on the will was the decedent’s because the lawyer and paralegal did not demonstrate a familiarity with the decedent’s signature. Ammons v. Clouds, 295 Ga. 225, 758 S.E.2d 282 (2014).

24-9-902. Self-authentication.

JUDICIAL DECISIONS

ANALYSIS

CERTIFICATE AND SEAL

TREATMENT OF SPECIFIC RECORDS

1. IN GENERAL

Certificate and Seal

Cited in *Roberts v. Cmty. & S. Bank*, 331 Ga. App. 364, 771 S.E.2d 68 (2015).

Treatment of Specific Records

1. In General

Loan documents. — Limited liability company and its individual members were properly held liable to a bank following

their failure because there was ample undisputed evidence that the bank was the company’s successor-in-interest under the credit line agreements as various documents allowed judicial notice that the bank had acquired the company’s assets and the loan documents were properly authenticated. *Jaycee Atlanta Dev., LLC v. Providence Bank*, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

ARTICLE 2

SPECIFIC TYPES OF RECORDS AND EVIDENCE

24-9-921. Identification of medical bills; expert witness unnecessary.

JUDICIAL DECISIONS

Admission of medical bills. — No error occurred in admitting the edited medical bills over the defendant’s objection because the plaintiff provided lay testimony that the edited bills admitted into evidence were related solely to the

injury at issue in the present litigation and the defendant elected not to cross-examine the witness regarding those bills. *Emory Healthcare, Inc. v. Pardue*, 328 Ga. App. 664, 760 S.E.2d 674 (2014).

24-9-922. Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; full faith and credit.

JUDICIAL DECISIONS

ANALYSIS

FULL FAITH AND CREDIT GRANTED

Full Faith and Credit Granted

Judicial records and proceedings.

Trial court properly denied the applicants’ motion to terminate a father’s parental rights and denied the applicants’ adoption petition because a State of Alabama paternity order obtained by the fa-

ther was substantially equivalent to a Georgia legitimation order such that the father had not lost his right to contest the adoption and the father properly domesticated the Alabama order with the trial court. *Park v. Bailey*, 329 Ga. App. 569, 765 S.E.2d 721 (2014).

24-9-923. Authentication of photographs, motion pictures, video recordings, and audio recordings when witness unavailable.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
AUDIOTAPES

General Consideration

Cited in Rodriguez-Nova v. State, Ga., S.E.2d (2014).

Audiotapes

9-1-1 call admissible.

Although the 9-1-1 operator did not speak Spanish, because the operator reviewed the recording, identified the recording as a fair and accurate reproduc-

tion of the call with no additions or deletions, recognized the operator’s own voice, and identified the interpreter’s voice, the trial court did not abuse the court’s discretion when the court admitted the recording of the 9-1-1 call, regardless of the operator’s inability to understand the Spanish portions of the recorded conversation. Rodriguez-Nova v. State, 295 Ga. 868, 763 S.E.2d 698 (2014) (decided under former O.C.G.A. § 24-4-48).

CHAPTER 10

BEST EVIDENCE RULE

24-10-1001. Definitions.

Law reviews. — For article, “The Best Evidence Rule Made Better: A Glimpse into Georgia’s New Evidence Code,” see 19

Ga. St. B.J. 12 (Aug. 2013). For annual survey on evidence law, see 66 Mercer L. Rev. 81 (2014).

24-10-1002. Requirement of original.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
APPLICATION

General Consideration

Cited in Jaycee Atlanta Dev., LLC v. Providence Bank, 330 Ga. App. 322, 765 S.E.2d 536 (2014).

Application

Transcript of online conversations. — With regard to the defendant’s convic-

tion for criminal attempt to commit child molestation and related crimes, the trial court did not err in admitting into evidence transcripts of all of the online conversations between the defendant and a detective, posing as the 15-year-old victim, because the detective testified that the detective participated in all of the online conversations with the defendant;

Application (Cont'd)

that the detective created the transcripts by copying the text exactly as the text appeared on the computer screen, without making any additions, omissions, or other alterations to that text; and that the transcript reflected the exact words used in the conversation, as well as the online names used by the persons who typed those words, which was sufficient to authenticate the transcript. *Castaneira v. State*, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

Existence of writing.

Trial court erred in granting summary

judgment to a rehabilitation company based on a contractual exculpatory clause because the material provisions of the agreement at issue were illegible, and given that an affidavit was insufficient to establish a basis for the admission of the alleged exemplar, the company failed to show that the agreement signed by the participant contained an exculpatory clause waiving and releasing the company from liability for the company’s own negligence. *Sanchez v. Atlanta Union Mission Corp.*, 329 Ga. App. 158, 764 S.E.2d 178 (2014).

24-10-1003. Admissibility of duplicates.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

1. IN GENERAL

Application

1. In General

Transcript of online conversations.

— With regard to the defendant’s conviction for criminal attempt to commit child molestation and related crimes, the trial court did not err in admitting into evidence transcripts of all of the online conversations between the defendant and a detective, posing as the 15-year-old victim, because the detective testified that the detective participated in all of the

online conversations with the defendant; that the detective created the transcripts by copying the text exactly as the text appeared on the computer screen, without making any additions, omissions, or other alterations to that text; and that the transcript reflected the exact words used in the conversation, as well as the online names used by the persons who typed those words, which was sufficient to authenticate the transcript. *Castaneira v. State*, 321 Ga. App. 418, 740 S.E.2d 400 (2013).

24-10-1004. Admissibility of other evidence of contents of a writing, recording, or photograph.

JUDICIAL DECISIONS

ANALYSIS

APPLICATION

- 1. IN GENERAL
- 3. CRIMINAL MATTERS

Application

1. In General

Illegible writing as part of contract.

— Trial court erred in granting summary judgment to a rehabilitation company based on a contractual exculpatory clause because the material provisions of the agreement at issue were illegible, and given that an affidavit was insufficient to establish a basis for the admission of the alleged exemplar, the company failed to show that the agreement signed by the participant contained an exculpatory clause waiving and releasing the company from liability for the company’s own negligence. *Sanchez v. Atlanta Union Mission Corp.*, 329 Ga. App. 158, 764 S.E.2d 178 (2014).

Proving lost antenuptial agreement. — In a divorce case, applying the preponderance of the evidence standard, and deferring to the trial court’s finding that both a husband and a wife believed

their opposing positions regarding the contents of a lost antenuptial agreement, the husband failed to prove the terms of the lost agreement, and the agreement could not be enforced. *Coxwell v. Coxwell*, 296 Ga. 311, 765 S.E.2d 320 (2014).

3. Criminal Matters

Evidence lost 13 years after use at earlier trial. — Although a note that the defendant left after stabbing the defendant’s ex-wife 13 years earlier could not be located, the state explained that the state had attempted to locate the note in the prior prosecutor’s file and it was believed destroyed. At the defendant’s trial for the slaying of an ex-female friend, at which the defendant left a similar note, an officer was properly allowed to testify as to the officer’s recollection of the first note’s contents. *Hooks v. State*, 295 Ga. 835, 764 S.E.2d 409 (2014) (decided under former O.C.G.A. §§ 24-5-4 and 24-5-21).

24-10-1006. Summaries.

JUDICIAL DECISIONS

Loan history report properly admitted. — Trial court properly admitted the bank’s loan history report as a business record because the report provided a description of each transaction relating to the estate’s loan from the loan’s inception, along with a corresponding posting date

for each transaction, the transaction amount, and any change to the principal balance resulting from the transaction, and was not a summary. *Roberts v. Cmty. & S. Bank*, 331 Ga. App. 364, 771 S.E.2d 68 (2015).

CHAPTER 12

MEDICAL AND OTHER CONFIDENTIAL INFORMATION

Article 3

AIDS Information

Sec.
24-12-21. Disclosure of AIDS confidential information.

ARTICLE 1

RELEASE OF MEDICAL INFORMATION AND
CONFIDENTIALITY OF RAW RESEARCH DATA

24-12-1. When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted.

JUDICIAL DECISIONS

Defendant placed mental state in issue. — Trial court did not err when the court denied a motion in limine and allowed a psychiatrist who examined the defendant in jail to testify because the defendant placed the defendant's mental capacity in issue when the defendant filed a notice of intent to pursue a defense of

not guilty by reason of insanity, which constituted a waiver of any state constitutional right of privacy or statutory privilege in the defendant's mental health records. *Armstead v. State*, 293 Ga. 243, 744 S.E.2d 774 (2013) (decided under former O.C.G.A. 24-9-40).

ARTICLE 3

AIDS INFORMATION

24-12-21. Disclosure of AIDS confidential information.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for such term in Code Section 31-22-9.1.

(b) Except as otherwise provided in this Code section:

(1) No person or legal entity which receives AIDS confidential information pursuant to this Code section or which is responsible for recording, reporting, or maintaining AIDS confidential information shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity; and

(2) No person or legal entity which receives AIDS confidential information which that person or legal entity knows was disclosed in violation of paragraph (1) of this subsection shall:

(A) Intentionally or knowingly disclose that information to another person or legal entity; or

(B) Be compelled by subpoena, court order, or other judicial process to disclose that information to another person or legal entity.

(c) AIDS confidential information shall be disclosed to the person identified by that information or, if that person is a minor or incompetent person, to that person's parent or legal guardian.

(d) AIDS confidential information shall be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the person identified by that information or, if that person is a minor or incompetent person, by that person's parent or legal guardian.

(e) AIDS confidential information shall be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if that information is authorized or required by law to be reported to that agency or department.

(f) The results of an HIV test shall be disclosed to the person, or that person's designated representative, who ordered such tests of the body fluids or tissue of another person.

(g) When the patient of a physician has been determined to be infected with HIV and that patient's physician reasonably believes that the spouse or sexual partner or any child of the patient, spouse, or sexual partner is a person at risk of being infected with HIV by that patient, the physician may disclose to that spouse, sexual partner, or child that the patient has been determined to be infected with HIV, after first attempting to notify the patient that such disclosure is going to be made.

(h)(1) An administrator of an institution licensed as a hospital by the Department of Community Health or a physician having a patient who has been determined to be infected with HIV may disclose to the Department of Public Health:

(A) The name and address of that patient;

(B) That such patient has been determined to be infected with HIV; and

(C) The name and address of any other person whom the disclosing physician or administrator reasonably believes to be a person at risk of being infected with HIV by that patient.

(2) When mandatory and nonanonymous reporting of confirmed positive HIV tests to the Department of Public Health is determined by that department to be reasonably necessary, that department shall establish by regulation a date on and after which such reporting shall be required. On and after the date so established, each health

care provider, health care facility, or any other person or legal entity which orders an HIV test for another person shall report to the Department of Public Health the name and address of any person thereby determined to be infected with HIV. No such report shall be made regarding any confirmed positive HIV test provided at any anonymous HIV test site operated by or on behalf of the Department of Public Health.

(3) The Department of Public Health may disclose that a person has been reported, under paragraph (1) or (2) of this subsection, to have been determined to be infected with HIV to the board of health of the county in which that person resides or is located if reasonably necessary to protect the health and safety of that person or other persons who may have come in contact with the body fluids of the HIV infected person. The Department of Public Health or county board of health to which information is disclosed pursuant to this paragraph or paragraph (1) or (2) of this subsection:

(A) May contact any person named in such disclosure as having been determined to be an HIV infected person for the purpose of counseling that person and requesting therefrom the name of any other person who may be a person at risk of being infected with HIV by that HIV infected person;

(B) May contact any other person reasonably believed to be a person at risk of being infected with HIV by that HIV infected person for the purposes of disclosing that such infected person has been determined to be infected with HIV and counseling such person to submit to an HIV test; and

(C) Shall contact and provide counseling to the spouse of any HIV infected person whose name is thus disclosed if both persons are reasonably likely to have engaged in sexual intercourse or any other act determined by the Department of Public Health likely to have resulted in the transmission of HIV between such persons within the preceding seven years and if that spouse may be located and contacted without undue difficulty.

(h.1) The Department of Public Health may disclose AIDS confidential information regarding a person who has been reported, under paragraph (1) or (2) of subsection (h), to be infected with HIV to a health care provider licensed pursuant to Chapter 11, 26, or 34 of Title 43 whom that person has consulted for medical treatment or advice.

(i) Any health care provider authorized to order an HIV test may disclose AIDS confidential information regarding a patient thereof if that disclosure is made to a health care provider or health care facility which has provided, is providing, or will provide any health care service to that patient and as a result of such provision of service that health care provider or facility:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(j) A health care provider or any other person or legal entity authorized but not required to disclose AIDS confidential information pursuant to this Code section shall have no duty to make such disclosure and shall not be liable to the patient or any other person or legal entity for failing to make such disclosure. A health care provider or any other person or legal entity which discloses information as authorized or required by this Code section or as authorized or required by law or rules or regulations made pursuant thereto shall have no civil or criminal liability therefor.

(k) When any person or legal entity is authorized or required by this Code section or any other law to disclose AIDS confidential information to a person at risk of being infected with HIV and that person at risk is a minor or incompetent person, such disclosure may be made to any parent or legal guardian of the minor or incompetent person, to the minor or incompetent person, or to both the minor or incompetent person and any parent or legal guardian thereof.

(l) When an institutional care facility is the site at which a person is at risk of being infected with HIV and as a result of that risk a disclosure of AIDS confidential information to any person at risk at that site is authorized or required under this Code section or any other law, such disclosure may be made to the person at risk or to that institutional care facility's chief administrative or executive officer, or such officer's designee, in which case that officer or designee shall be authorized to make such disclosure to the person at risk.

(m) When a disclosure of AIDS confidential information is authorized or required by this Code section to be made to a physician, health care provider, or legal entity, that disclosure may be made to employees of that physician, health care provider, or legal entity who have been designated thereby to receive such information on behalf thereof. Those designated employees may thereafter disclose to and provide for the disclosure of that information among such other employees of that physician, health care provider, or legal entity, but such disclosures among those employees shall only be authorized when reasonably necessary in the ordinary course of business to carry out the purposes for which that disclosure is authorized or required to be made to that physician, health care provider, or legal entity.

(n) Any disclosure of AIDS confidential information authorized or required by this Code section or any other law and any unauthorized

disclosure of such information shall in no way destroy the confidential nature of that information except for the purpose for which the authorized or required disclosure is made.

(o) Any person or legal entity which violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(p) Nothing in this Code section or any other law shall be construed to authorize the disclosure of AIDS confidential information if that disclosure is prohibited by federal law, or regulations promulgated thereunder, nor shall anything in this Code section or any other law be construed to prohibit the disclosure of information which would be AIDS confidential information except that such information does not permit the identification of any person.

(q) A public safety agency or prosecuting attorney may obtain the results from an HIV test to which the person named in the request has submitted under Code Section 15-11-603, 17-10-15, 42-5-52.1, or 42-9-42.1, notwithstanding that the results may be contained in a sealed record.

(r) Any person or legal entity required by an order of a court to disclose AIDS confidential information in the custody or control of such person or legal entity shall disclose that information as required by that order.

(s) AIDS confidential information shall be disclosed as medical information pursuant to Code Section 24-12-1 or pursuant to any other law which authorizes or requires the disclosure of medical information if:

(1) The person identified by that information:

(A) Has consented in writing to that disclosure;

(B) Has been notified of the request for disclosure of that information at least ten days prior to the time the disclosure is to be made and does not object to such disclosure prior to the time specified for that disclosure in that notice; or

(C) Is suspected of being mentally ill and is the subject of an order issued pursuant to Code Section 37-3-41 when the court issuing such order finds in an in camera hearing by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that

disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; or

(2) A superior court in an in camera hearing finds by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this paragraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal.

(t)(1) A superior court of this state may order a person or legal entity to disclose AIDS confidential information in its custody or control to:

(A) A prosecutor in connection with a prosecution for the alleged commission of reckless conduct under subsection (c) of Code Section 16-5-60;

(B) Any party in a civil proceeding; or

(C) A public safety agency or the Department of Public Health if that agency or department has an employee thereof who has, in the course of that employment, come in contact with the body fluids of the person identified by the AIDS confidential information sought in such a manner reasonably likely to cause that employee to become an HIV infected person and provided the disclosure is necessary for the health and safety of that employee,

and, for purposes of this subsection, the term "petitioner for disclosure" means any person or legal entity specified in subparagraph (A), (B), or (C) of this paragraph.

(2) An order may be issued against a person or legal entity responsible for recording, reporting, or maintaining AIDS confidential information to compel the disclosure of that information if the petitioner for disclosure demonstrates by clear and convincing evidence a compelling need for the information which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests.

(3) A petition seeking disclosure of AIDS confidential information under this subsection shall substitute a pseudonym for the true name of the person concerning whom the information is sought. The disclosure to the parties of that person's true name shall be communicated confidentially, in documents not filed with the court.

(4) Before granting any order under this subsection, the court shall provide the person concerning whom the information is sought with notice and a reasonable opportunity to participate in the proceedings if that person is not already a party.

(5) Court proceedings as to disclosure of AIDS confidential information under this subsection shall be conducted in camera unless the person concerning whom the information is sought agrees to a hearing in open court.

(6) Upon the issuance of an order that a person or legal entity be required to disclose AIDS confidential information regarding a person named in that order, that person or entity so ordered shall disclose to the ordering court any such information which is in the control or custody of that person or entity and which relates to the person named in the order for the court to make an in camera inspection thereof. If the court determines from that inspection that the person named in the order is an HIV infected person, the court shall disclose to the petitioner for disclosure that determination and shall impose appropriate safeguards against unauthorized disclosure which shall specify the persons who may have access to the information, the purposes for which the information shall be used, and appropriate prohibitions on future disclosure.

(7) The record of the proceedings under this subsection shall be sealed by the court.

(8) An order may not be issued under this subsection against the Department of Public Health, any county board of health, or any anonymous HIV test site operated by or on behalf of that department.

(u) A health care provider, health care facility, or other person or legal entity who, in violation of this Code section, unintentionally discloses AIDS confidential information, notwithstanding the maintenance of procedures thereby which are reasonably adopted to avoid risk of such disclosure, shall not be civilly or criminally liable, unless such disclosure was due to gross negligence or wanton and willful misconduct.

(v) AIDS confidential information may be disclosed when that disclosure is otherwise authorized or required by Code Section 42-1-6, if AIDS or HIV infection is the communicable disease at issue, or when that disclosure is otherwise authorized or required by any law which

specifically refers to “AIDS confidential information,” “HIV test results,” or any similar language indicating a legislative intent to disclose information specifically relating to AIDS or HIV.

(w) A health care provider who has received AIDS confidential information regarding a patient from the patient’s health care provider directly or indirectly under the provisions of subsection (i) of this Code section may disclose that information to a health care provider which has provided, is providing, or will provide any health care service to that patient and as a result of that provision of service that health care provider:

(1) Has personnel or patients who may be persons at risk of being infected with HIV by that patient, if that patient is an HIV infected person and such disclosure is reasonably necessary to protect any such personnel or patients from that risk; or

(2) Has a legitimate need for that information in order to provide that health care service to that patient.

(x) Neither the Department of Public Health nor any county board of health shall disclose AIDS confidential information contained in its records unless such disclosure is authorized or required by this Code section or any other law, except that such information in those records shall not be a public record and shall not be subject to disclosure through subpoena, court order, or other judicial process.

(y) The protection against disclosure provided by Code Section 24-12-20 shall be waived and AIDS confidential information may be disclosed to the extent that the person identified by such information, his or her heirs, successors, assigns, or a beneficiary of such person, including, but not limited to, an executor, administrator, or personal representative of such person’s estate:

(1) Files a claim or claims other entitlements under any insurance policy or benefit plan or is involved in any civil proceeding regarding such claim;

(2) Places such person’s care and treatment, the nature and extent of his or her injuries, the extent of his or her damages, his or her medical condition, or the reasons for his or her death at issue in any judicial proceeding; or

(3) Is involved in a dispute regarding coverage under any insurance policy or benefit plan.

(z) AIDS confidential information may be collected, used, and disclosed by an insurer in accordance with the provisions of Chapter 39 of Title 33.

(aa) In connection with any judicial proceeding in which AIDS confidential information is disclosed as authorized or required by this

Code section, the party to whom that information is thereby disclosed may subpoena any person to authenticate such AIDS confidential information, establish a chain of custody relating thereto, or otherwise testify regarding that information, including, but not limited to, testifying regarding any notifications to the patient regarding results of an HIV test. The provisions of this subsection shall apply to records, personnel, or both of the Department of Public Health or a county board of health notwithstanding Code Section 50-18-72, but only as to test results obtained by a prosecutor under subsection (q) of this Code section and to be used thereby in a prosecution for reckless conduct under subsection (c) of Code Section 16-5-60.

(bb) AIDS confidential information may be disclosed as a part of any proceeding or procedure authorized or required pursuant to Chapter 3, 4, or 7 of Title 37, regarding a person who is alleged to be or who is mentally ill, developmentally disabled, or alcoholic or drug dependent, or as a part of any proceeding or procedure authorized or required pursuant to Title 29, regarding the guardianship of a person or that person's estate, as follows:

(1) Any person who files or transmits a petition or other document which discloses AIDS confidential information in connection with any such proceeding or procedure shall provide a cover page which contains only the type of proceeding or procedure, the court in which the proceeding or procedure is or will be pending, and the words "CONFIDENTIAL INFORMATION" without in any way otherwise disclosing thereon the name of any individual or that such petition or other document specifically contains AIDS confidential information;

(2) AIDS confidential information shall only be disclosed pursuant to this subsection after disclosure to and with the written consent of the person identified by that information, or that person's parent or guardian if that person is a minor or has previously been adjudicated as being incompetent, or by order of court obtained in accordance with subparagraph (C) of paragraph (3) of this subsection;

(3) If any person files or transmits a petition or other document in connection with any such proceeding or procedure which discloses AIDS confidential information without obtaining consent as provided in paragraph (2) of this subsection, the court receiving such information shall either obtain written consent as set forth in that paragraph (2) for any further use or disclosure of such information or:

(A) Return such petition or other document to the person who filed or transmitted same, with directions against further filing or transmittal of such information in connection with such proceeding or procedure except in compliance with this subsection;

(B) Delete or expunge all references to such AIDS confidential information from the particular petition or other document; or

(C)(i) If the court determines there is a compelling need for such information in connection with the particular proceeding or procedure, petition a superior court of competent jurisdiction for permission to obtain or disclose that information. If the person identified by the information is not yet represented by an attorney in the proceeding or procedure in connection with which the information is sought, the petitioning court shall appoint an attorney for such person. The petitioning court shall have both that person and that person's attorney personally served with notice of the petition and time and place of the superior court hearing thereon. Such hearing shall not be held sooner than 72 hours after service, unless the information is to be used in connection with an emergency guardianship proceeding under Code Section 29-4-14, in which event the hearing shall not be held sooner than 48 hours after service.

(ii) The superior court in which a petition is filed pursuant to division (i) of this subparagraph shall hold an in camera hearing on such petition. The purpose of the hearing shall be to determine whether there is clear and convincing evidence of a compelling need for the AIDS confidential information sought in connection with the particular proceeding or procedure which cannot be accommodated by other means. In assessing compelling need, the superior court shall weigh the public health, safety, or welfare needs or any other public or private need for the disclosure against the privacy interest of the person identified by the information and the public interest which may be disserved by disclosures which may deter voluntary HIV tests. If the court determines that disclosure of that information is authorized under this subparagraph, the court shall order that disclosure and impose appropriate safeguards against any unauthorized disclosure. The records of that hearing otherwise shall be under seal; and

(4) The court having jurisdiction over such proceeding or procedure, when it becomes apparent that AIDS confidential information will likely be or has been disclosed in connection with such proceeding or procedure, shall take such measures as the court determines appropriate to preserve the confidentiality of the disclosed information to the maximum extent possible. Such measures shall include, without being limited to, closing the proceeding or procedure to the public and sealing all or any part of the records of the proceeding or procedure containing AIDS confidential information. The records of any appeals taken from any such proceeding or procedure shall also be sealed. Furthermore, the court may consult with and obtain the advice of medical experts or other counsel or advisers as to the relevance and materiality of such information in such proceedings or

procedures, provided that the identity of the person identified by such information is not thereby revealed. (Code 1981, § 24-12-21, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2012, p. 775, § 24/HB 942; Ga. L. 2013, p. 294, § 4-42/HB 242; Ga. L. 2014, p. 814, § 1/SB 342; Ga. L. 2015, p. 598, § 1A-1/HB 72.)

The 2014 amendment, effective July 1, 2014, added subsection (h.1).
The 2015 amendment, effective July 1, 2015, in paragraph (s)(1), deleted “or” at the end of subparagraph (A) and added subparagraph (s)(1)(C).

CHAPTER 13

SECURING ATTENDANCE OF WITNESSES AND PRODUCTION AND PRESERVATION OF EVIDENCE

Article 6

Depositions to Preserve Testimony in Criminal Proceedings

Sec.
24-13-132. Appointment of counsel; payment of costs and expenses.

ARTICLE 2

SUBPOENAS AND NOTICE TO PRODUCE

24-13-23. Subpoena for production of documentary evidence; motion to quash or modify.

JUDICIAL DECISIONS

Cited in Walker v. State, 323 Ga. App. 558, 747 S.E.2d 51 (2013).

24-13-25. Fees and mileage; when tender required.

JUDICIAL DECISIONS

Tender of fee and mileage.
While a witness fee and mileage expenses might not have been a prerequisite to the production of documents, the subpoena and letter served upon the Georgia Department of Corrections’ legal counsel instructed that “you are hereby required to be and appear” and listed the documents and evidence the Department was to bring to the hearing. Thus, pursuant to former O.C.G.A. § 24-10-24, the attendant witness fee and mileage expense were required. Williams v. Russo, 322 Ga. App. 654, 745 S.E.2d 842 (2013) (decided under former O.C.G.A. § 24-10-24).

24-13-26. Enforcement of subpoenas; continuance; secondary evidence of books, papers, or documents.

JUDICIAL DECISIONS

Cited in 915 Indian Trail, LLC v. State Bank & Trust Co., 328 Ga. App. 524, 759 S.E.2d 654 (2014).

24-13-27. Notice to produce.

JUDICIAL DECISIONS

ANALYSIS

CRIMINAL CASES
3. ITEMS SUBJECT TO NOTICE TO PRODUCE

Criminal Cases

3. Items Subject to Notice to Produce

Cited in 915 Indian Trail, LLC v. State Bank & Trust Co., 328 Ga. App. 524, 759 S.E.2d 654 (2014).

ARTICLE 4

UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES
FROM WITHOUT THE STATE

24-13-90. Short title.

JUDICIAL DECISIONS

Cited in Young v. State, 324 Ga. App. 127, 749 S.E.2d 423 (2013).

24-13-94. Criminal or grand jury proceeding in this state — Issuance of certificate; how long witness detained; punishment.

JUDICIAL DECISIONS

Witness not material. — Trial court properly concluded that an out-of-state witness, who could have testified as to source codes for the breath testing device, was not “material” as the defendant presented no evidence mouth alcohol was present during a breath test such that an error message should have been gener-

ated that was not; the mere possibility that alcohol remained in the defendant’s mouth due to a surgical implant and re-tainer was not evidence pointing to actual existence of excess alcohol in the mouth. Cronkite v. State, 293 Ga. 476, 745 S.E.2d 591 (2013) (decided under former O.C.G.A. § 24-10-94).

Out-of-state corporation.

In 10 driving under the influence cases, because the defendants failed to present any evidence of facts supporting the existence of an error in their breath test results as required by case law, the trial court did not abuse the court's discretion when the court determined that the defendants failed to show that the machine's manufacturer was a material witness under the Uniform Act to Secure Attendance of an Out-of-State Witness, O.C.G.A. § 24-13-94(a). *Young v. State*, 324 Ga. App. 127, 749 S.E.2d 423 (2013).

Continuance of case properly denied. — Trial court did not abuse the court's discretion by denying the defendant's request for a continuance because the court had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information and witnesses from the breathalyzer manufacturer set the case with

enough time for the defense to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required the defendant to proceed to trial. *Phillips v. State*, 324 Ga. App. 728, 751 S.E.2d 526 (2013).

Full faith and credit given to out-of-state order. — Trial court did not err by requiring defendant to proceed to trial without the source code and other requested information because it had granted a certificate pursuant to O.C.G.A. § 24-13-94 to permit the defense an opportunity to obtain the information from the manufacturer located in Kentucky, set the case with enough time to do so, and, after the Kentucky court issued an order denying the request, which order was entitled to full faith and credit, required defendant to proceed to trial. *Phillips v. State*, 324 Ga. App. 728, 751 S.E.2d 526 (2013).

ARTICLE 6

DEPOSITIONS TO PRESERVE TESTIMONY IN CRIMINAL PROCEEDINGS

24-13-132. Appointment of counsel; payment of costs and expenses.

(a) If an accused is financially unable to employ counsel, the court shall appoint counsel as provided in Chapter 12 of Title 17, unless the accused elects to proceed without counsel.

(b) Whenever a deposition is taken at the instance of the state, the cost of any such deposition shall be paid by the state by the Prosecuting Attorneys' Council of the State of Georgia out of such funds as may be appropriated for the operations of the district attorneys.

(c) Depositions taken at the instance of an accused shall be paid for by the accused; provided, however, that, whenever a deposition is taken at the instance of an accused who is eligible for the appointment of counsel as provided in Chapter 12 of Title 17, the court shall direct that the reasonable expenses for the taking of the deposition and of travel and subsistence of the accused and the accused's attorney for attendance at the examination, not to exceed the limits established pursuant to Article 2 of Chapter 7 of Title 45, be paid for out of the fine and bond forfeiture fund of the county where venue is laid. (Code 1981, § 24-13-132, enacted by Ga. L. 2011, p. 99, § 2/HB 24; Ga. L. 2015, p. 693, § 3-33/HB 233.)

The 2015 amendment, effective July 1, 2015, substituted “fine and bond forfeiture fund” for “fine and forfeiture fund” near the end of subsection (c). See editor’s note for applicability.

Editor’s notes. — Ga. L. 2015, p. 693, § 4-1/HB 233, not codified by the General

Assembly, provides: “This Act shall become effective on July 1, 2015, and shall apply to seizures of property for forfeiture that occur on or after that date. Any such seizure that occurs before July 1, 2015, shall be governed by the statute in effect at the time of such seizure.”

CHAPTER 14

PROOF GENERALLY

ARTICLE 1

GENERAL PROVISIONS

24-14-3. Amount of mental conviction required; preponderance of evidence in civil cases.

JUDICIAL DECISIONS

ANALYSIS

CIVIL CASES

Civil Cases

Preponderance standard establishing terms of lost document. — In a divorce case, applying the preponderance of the evidence standard, and deferring to the trial court’s finding that both a hus-

band and a wife believed their opposing positions regarding the contents of a lost antenuptial agreement, the husband failed to prove the terms of the lost agreement, and the agreement could not be enforced. *Coxwell v. Coxwell*, 296 Ga. 311, 765 S.E.2d 320 (2014).

24-14-6. When conviction may be had on circumstantial evidence.

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- EXCLUSION OF REASONABLE HYPOTHESIS
- INSTRUCTIONS
- SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE

General Consideration

Witness credibility does convert direct evidence into circumstantial evidence. — Appellate court rejected the defendant’s argument that the evidence

presented at trial was legally insufficient to support the defendant’s convictions based on the state’s two key witnesses being so unreliable that the witnesses’ testimony should be considered circumstantial rather than direct evidence be-

General Consideration (Cont'd)

cause direct evidence from a witness who observed a crime does not convert into circumstantial evidence by the witness's credibility or lack thereof. *Lewis v. State*, 296 Ga. 259, 765 S.E.2d 911 (2014).

Cited in *Rodriguez-Nova v. State*, 295 Ga. 868, 763 S.E.2d 698 (2014) (decided under former O.C.G.A. § 24-4-6); *Walker v. State*, 329 Ga. App. 369, 765 S.E.2d 599 (2014).

Exclusion of Reasonable Hypothesis**Consideration of defendant's explanation.**

Evidence presented at trial was sufficient to authorize a rational jury to find the defendant guilty beyond a reasonable doubt of felony murder based on the testimony of several witnesses that the defendant hit the victim in the back of the head with a brick and, despite the defendant asserting that another individual hit the victim, it was for the jury to determine the credibility of the witnesses and the weight of the evidence. *Wilson v. State*, 295 Ga. 84, 757 S.E.2d 825 (2014).

Instructions**Only when the case is wholly dependent on circumstantial evidence, etc.**

Because the state presented direct evidence that the defendant committed a drive-by shooting and the defendant did not request the full circumstantial evidence instruction in writing, the trial court did not commit reversible error; the trial court instructed the jury on the definition of circumstantial evidence and gave a full instruction on reasonable doubt. *Walker v. State*, 295 Ga. 688, 763 S.E.2d 704 (2014).

When charge not required.

Because the defendant's admissions of guilt following the killing were direct evidence of the defendant's guilt, the state's case was not based solely on circumstantial evidence and the additional circumstantial evidence charge requested by the defendant was not required. *Rodriguez-Nova v. State*, 295 Ga. 868, 763 S.E.2d 698 (2014) (decided under former O.C.G.A. § 24-4-6).

Instruction held not erroneous.

Since the state's case was based upon direct as well as circumstantial evidence, the trial court did not err under former O.C.G.A. § 24-4-6 by sua sponte charging the jury on the standard of proof necessary to convict an accused on circumstantial evidence. *Cupe v. State*, 327 Ga. App. 642, 760 S.E.2d 647 (2014) (decided under former O.C.G.A. § 24-4-6).

Sufficiency of Circumstantial Evidence**Evidence sufficient for conviction of sexual exploitation.**

Evidence was sufficient to convict the defendant of 15 counts of sexual exploitation of children based on the child pornography found on the defendant's girlfriend's computer because a Georgia Bureau of Investigation expert in computer forensics explained that there was no evidence that a virus had downloaded any of the illegal files, and that there was no evidence that anyone had hacked into the computer; the defendant's mother, the defendant's girlfriend, and the defendant's girlfriend's mother and brothers testified that they did not download the illegal files onto the computer; and the downloads began just one month after the defendant moved in with the defendant's girlfriend and only on days when the defendant was not incarcerated. *Beaver v. State*, 330 Ga. App. 496, 767 S.E.2d 503 (2014) (decided under former O.C.G.A. § 24-4-6).

Evidence sufficient for possession with intent to distribute.

Appellate court refused to disturb the jury's verdict convicting defendant of possession of drugs with the intent to distribute because after hearing the evidence and having the opportunity to judge the credibility of the witnesses, the jury properly concluded that the only reasonable hypothesis was that defendant possessed the drugs found hidden in the kitchen, despite defendant's argument that others had equal access. *King v. State*, 325 Ga. App. 777, 755 S.E.2d 22 (2014).

Evidence insufficient for burglary conviction.

Evidence was sufficient to convict defendant of the burglary of two residences

where defendant's shoe prints and tire tracks were found; both tire tracks and shoe prints connected defendant to these burglaries, and defendant was caught by the police wearing the same shoes and driving the same car while in the process of participating in the burglary of a third residence, located near the first two residences. *Wise v. State*, 325 Ga. App. 377, 752 S.E.2d 628 (2013) (decided under former O.C.G.A. § 24-4-6).

Burglary conviction.

Circumstantial evidence that a cigarette butt with the defendant's DNA on the butt was found in a burglary victim's home, that the defendant was seen standing in a neighbor's yard, that the defendant was wet and muddy, and that some of the stolen items were also wet and near a creek near the victim's home was sufficient to support the defendant's burglary conviction. *Stokes v. State*, 327 Ga. App. 511, 759 S.E.2d 585 (2014).

Malice murder.

Evidence was sufficient to find the defendant guilty of the malice murder because the defendant and the victim had a domestic dispute over the money that the defendant had borrowed from the victim; two days later, human body parts that were later identified as the victim's were found scattered around a secluded, wooded area near a house owned by the defendant; a coroner examined the remains and determined that the cause of death was homicide by unknown cause; the defendant never reported the victim missing; the defendant told conflicting stories about the victim's disappearance and the defendant's activities around that time; and the defendant towed the victim's car to a hotel parking lot and left the car. *Benson v. State*, 294 Ga. 618, 754 S.E.2d 23 (2014).

Evidence sufficient to support conviction of trafficking in methamphetamine.

Evidence was sufficient to convict the defendant of trafficking in methamphetamine because the defendant was in joint constructive possession of methamphetamine found under the seat of the vehicle the defendant was driving, and the jury was entitled to reject the defendant's alternative hypothesis that the defendant

believed the defendant was simply delivering a vehicle to a motel as the jury could have found that, given the high street value of the methamphetamine, the defendant would not have been permitted to drive the vehicle alone to the motel unless the defendant was a trusted accomplice. *Garcia-Maldonado v. State*, 324 Ga. App. 518, 751 S.E.2d 149 (2013) (decided under former O.C.G.A. § 24-4-6).

Evidence held sufficient to support murder conviction. — Although circumstantial, the evidence was sufficient to convict the defendant of murder, armed robbery, and related crimes in connection with the death of the victim because the defendant was identified by a witness as the person the witness saw coming upstairs from the victim's apartment just before the witness discovered the crimes; the defendant's fingerprints were found on the car used in the crimes; and the defendant's own statements, both via text message and in person, corroborated the defendant's participation in the murder and robbery. *Babbage v. State*, 296 Ga. 364, 768 S.E.2d 461 (2015) (decided under former O.C.G.A. § 24-4-6).

Evidence held sufficient to support conviction.

Evidence presented was sufficient to authorize a rational jury to find that the state had excluded every reasonable hypothesis except that of appellant's guilt with regard to the felony murder of a two-year-old child left in appellant's care based on the child being healthy when left in appellant's care, died as the result of blunt force trauma to the head which could not have resulted from the normal activities of a child or a fall down the stairs, and appellant was alone with the child. *Alexander v. State*, 294 Ga. 345, 751 S.E.2d 408 (2013).

Evidence sufficient for forgery conviction. — Sufficient circumstantial evidence supported the defendant's conviction for forgery based on the reasonable inferences arising from the evidence showing that a check was drawn on an account of a roofing company for which the defendant never worked; thus, the inference arose that the defendant knew that the company did not owe any money to the defendant and that the defendant was not

Sufficiency of Circumstantial Evidence (Cont'd)

authorized to present the check for payment. *Bettes v. State*, 329 Ga. App. 13, 763 S.E.2d 366 (2014).

Evidence sufficient for murder conviction.

Circumstantial evidence, including that there was no evidence that the victim died from a cause other than asphyxia due to strangulation, the fact that the victim tested negative for drugs at the time of death, negating any theory about a lethal combination of alcohol and drugs, and the lack of evidence of forced entry to a room that the defendant and the victim shared was sufficient to support the defendant's murder conviction. *Simpson v. State*, 293 Ga. 131, 744 S.E.2d 49 (2013).

Circumstantial evidence was sufficient to convict the defendant of murder as the victim's daughter saw that the victim had about \$600 in the victim's wallet the day before the murder; after the murder, the victim's purse had no cash in it; the defendant's girlfriend identified the knife handle and blade found near the victim's body as the steak knife with a loosened handle that the girlfriend had used in cooking at the defendant's apartment; and the defendant admitted to another prisoner that

the defendant stabbed the victim. *Bates v. State*, 293 Ga. 855, 750 S.E.2d 323 (2013).

Jury could reasonably infer from the evidence that the defendant called the defendant's gang members to retrieve the defendant from an apartment where someone was threatening the defendant, as well as the defendant's celebrating with the gang that evening after the shooting, that the defendant was a party to the crime under O.C.G.A. § 16-2-20(b)(4) by advising, encouraging, counseling, or procuring others to commit the crime. *Slaton v. State*, 296 Ga. 122, 765 S.E.2d 332 (2014).

Evidence sufficient for felony murder conviction.

Circumstantial evidence was sufficient to convict the defendant of felony murder predicated upon aggravated assault because the evidence at the crime scene showed there had been a struggle; the victim's injuries were consistent with strangulation; male DNA taken from the victim's body was later matched to the defendant's DNA; no other male DNA was found in the samples taken from the victim's body; and the state excluded all reasonable hypotheses except that of the defendant's guilt. *Reeves v. State*, 294 Ga. 673, 755 S.E.2d 695 (2014) (decided under former O.C.G.A. § 24-4-6).

24-14-8. Number of witnesses required generally; exceptions; effect of corroboration.

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION
SUFFICIENCY OF CORROBORATING EVIDENCE
JURY

General Consideration

Testimony of single witness to establish fact.

Evidence was sufficient to find the defendant guilty of armed robbery and possession of a firearm during the commission of a felony even though it was based on the victim's identifications of the defendant's eyes. *Jones v. State*, 329 Ga. App. 478, 765 S.E.2d 657 (2014).

Victim's testimony sufficient.

Evidence from a victim that the defendant robbed the victim of cash, cell phones, and a GPS unit at knifepoint was sufficient pursuant to O.C.G.A. § 24-14-8 to establish that the defendant committed armed robbery with a knife in violation of O.C.G.A. §§ 16-8-41(a) and 16-11-106(b)(1), although the defendant testified that the victim gave the defendant these items for drugs. *Sanders v.*

State, 324 Ga. App. 4, 749 S.E.2d 14 (2013).

Evidence was sufficient to convict the defendant of three counts of aggravated assault, one count of burglary, and several firearms charges because: (1) both victims testified that the defendant was their assailant; and (2) the victims' testimony alone was sufficient to authorize a rational trier of fact to find the defendant guilty beyond a reasonable doubt of the charged offenses. *Smith v. State*, 325 Ga. App. 739, 754 S.E.2d 783 (2014) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to convict the defendant of rape because the victim testified that the defendant forced the victim to have vaginal intercourse with the defendant against the victim's will; the victim's testimony, standing alone, was sufficient to sustain the conviction; and testing showed that DNA found on the swabs taken from the victim as part of the sexual assault kit matched the defendant's DNA profile. *Miller v. State*, 325 Ga. App. 764, 754 S.E.2d 804 (2014) (decided under former O.C.G.A. § 24-4-8).

Sufficient evidence supported the defendant's convictions for aggravated assault with the intent to rape, aggravated sexual battery, and burglary based on the testimony of the victim that at approximately 4:00 a.m. the victim was in bed asleep when a man got into the victim's bed and began choking the victim, that it was not consensual, and that the perpetrator indicated watching the victim for some time and inserted two fingers into the victim's vagina. *Davis v. State*, 326 Ga. App. 778, 757 S.E.2d 443 (2014).

Cited in *Stephens v. State*, 323 Ga. App. 699, 747 S.E.2d 711 (2013).

Sufficiency of Corroborating Evidence

Corroboration by other accomplices. — Evidence was sufficient to convict the defendant of murder as the defendant used a knife to stab the victim in the neck; a jailhouse informant testified that the defendant had admitted that the defendant and a juvenile had beat the victim with a pan, strangled the victim with a belt, and stabbed the victim in the neck; and, even if the supreme court were to

assume that the only evidence of the defendant's guilt was the testimony of accomplices, because more than one accomplice testified at trial, the testimony of one accomplice could be corroborated by the testimony of the others. *Ramirez v. State*, 294 Ga. 440, 754 S.E.2d 325 (2014) (decided under former O.C.G.A. § 24-4-8).

Connection of defendant with crime.

Trial court did not err by denying the defendant's motion for a new trial based on the defendant's contention that the evidence was insufficient to corroborate the accomplice testimony implicating the defendant in the robbery because the testimony of the victim identified the defendant as the perpetrator and was sufficient corroboration of the accomplice's testimony. *Vann v. State*, 322 Ga. App. 148, 742 S.E.2d 767 (2013).

With regard to the defendant's murder conviction, the defendant's contention on appeal that the accomplice testimony used to convict was not corroborated was found meritless because there was slight evidence from an extraneous source identifying the defendant as a participant in the crime; specifically, authorities found the defendant's blood and palm print on the car used during the crime which evidence corroborated the accomplice's testimony that the defendant was injured on the broken glass of the window the men used to gain entry to the victim's house. *Lewis v. State*, 293 Ga. 110, 744 S.E.2d 21 (2013).

With regard to the defendant's robbery conviction, contrary to the defendant's contention that the testimony of an accomplice was uncorroborated and thus insufficient to support the conviction, there was no conflict in the testimony that the defendant was a participant; thus, the corroborating evidence was more than slight and was sufficient to authorize the jury to find that the accomplice's testimony was corroborated. *Carter v. State*, 324 Ga. App. 118, 749 S.E.2d 404 (2013).

Sufficient evidence supported the defendant's conviction for armed robbery based on the victim identifying the defendant as the person who hit the victim on the head, an accomplice's testimony, the victim's car keys were found in a bag that the defen-

Sufficiency of Corroborating Evidence (Cont'd)

dant had been holding when stopped by an officer, and the defendant fled from the officers when the officers attempted to arrest. *Brooks v. State*, 323 Ga. App. 681, 747 S.E.2d 688 (2013).

There was ample corroboration of the accomplice's testimony, including evidence that the murder weapon was found in the defendant's home, a cap and t-shirt like the ones that the victim said the defendant discarded near the murder scene were found near there, and the defendant's DNA was found on a cap found in the vehicle where the victims were shot. *Bradshaw v. State*, 296 Ga. 650, 769 S.E.2d 892 (2015).

Since the accomplice's testimony was corroborated by phone records, physical evidence, and the testimony of other witnesses, including the defendant's own statements to police, under former O.C.G.A. § 24-4-8, the evidence was sufficient to support the defendant's convictions. *McDonald v. State*, 296 Ga. 643, 770 S.E.2d 6 (2015) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the appellant's conviction as a party to the crime of violating O.C.G.A. § 40-6-395(a) for fleeing and eluding because the appellant testified and admitted shoplifting, admitted to having a prior record of shoplifting, had only recently been released from prison, and that getting caught on the day of the events would be a parole violation that would send the appellant back to prison. *McNeely v. State*, 296 Ga. 422, 768 S.E.2d 751 (2015).

Testimony of other witnesses sufficient.

Evidence was sufficient to support the defendant's convictions as the getaway driver's testimony about the heights of the defendant and the codefendant was consistent with the gas station clerk's comparison of their heights, and there was evidence that the defendant, who had no job, was spending significant amounts of money on cars and expensive clothing. *Harrell v. State*, 322 Ga. App. 115, 744 S.E.2d 105 (2013) (decided under former O.C.G.A. § 24-4-8).

Defense counsel was not ineffective for failing to request a charge on accomplice corroboration because the accomplice was not the only witness; thus, there was no error in failing to give the accomplice corroboration charge since the state relied on other evidence apart from the accomplice's testimony. *Lane v. State*, 324 Ga. App. 303, 750 S.E.2d 381 (2013).

In a case decided under former O.C.G.A. § 24-4-8, the testimony of an accomplice implicating the defendant was corroborated by evidence that the defendant believed the victim stole the defendant's cocaine, witnesses identified the defendant as being involved in dragging a man into a vehicle, and the victim's blood was found in the defendant's sister's basement. *McKibbins v. State*, 293 Ga. 843, 750 S.E.2d 314 (2013) (decided under former O.C.G.A. § 24-4-8).

Testimony of the victim's cousin was sufficient, under former O.C.G.A. § 24-4-8 (see now O.C.G.A. § 24-14-8), to corroborate the accomplice's identification of the defendant as the shooter. *Sutton v. State*, 295 Ga. 350, 759 S.E.2d 846 (2014) (decided under former O.C.G.A. § 24-4-8).

Evidence was sufficient to support the defendant's convictions for armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony in violation of O.C.G.A. §§ 16-8-41, 16-5-21, 16-5-41, and 16-11-106, based on testimony from witnesses inside the bank, the defendant's clothing, a text message between the defendant and the defendant's accomplice, and the defendant's accomplice's testimony, which was corroborated as required by O.C.G.A. § 24-14-8. *Odle v. State*, 331 Ga. App. 146, 770 S.E.2d 256 (2015).

Evidence was sufficient to convict the first defendant of felony murder, two counts of aggravated assault, and possession of a firearm during the commission of a crime because the testimony of the fourth defendant's ex-girlfriend placed the first defendant at the scene of the shooting when the shooting occurred, which corroborated the testimony of the state's witness, who was a participant in the crimes, that the witness saw the first defendant at the scene shooting a gun and then fleeing with the other defendants. *Grimes v.*

State, 296 Ga. 337, 766 S.E.2d 72 (2014).

Circumstantial evidence presented at trial sufficient to corroborate testimony of accomplice.

Sufficient corroborating evidence enabled the jury to conclude that the defendant was a party to the robbery based on testimony that the defendant and an accomplice met before and immediately following the robbery, defendant's own testimony of being in the drug business, cellular phone records indicating the defendant was in the vicinity of the robbery when the robbery occurred, eyewitness testimony, and evidence that the defendant sent the amount of money taken from the victim to another. *Jackson v. State*, 294 Ga. 34, 751 S.E.2d 63 (2013).

There was adequate corroboration.

Evidence that the defendant was linked to the getaway vehicle, and that the defendant was present the next morning at a hotel with the vehicle, the co-indictee, the first defendant, the marijuana, and the cash was sufficient corroborating evidence to support the defendant's convictions for felony murder and other crimes related to the armed robbery of the four victims and the subsequent shootings that killed the first victim and injured the second victim. *Cowart v. State*, 294 Ga. 333, 751 S.E.2d 399 (2013).

Evidence sufficiently corroborated the victim's testimony that the defendant, along with the three co-defendants, kidnapped the victim for ransom because the proprietor of a business located in the same strip mall as the victim's clothing store saw the victim being forcibly taken away; on conversations monitored from one of the co-defendant's telephones, the victim was overheard pleading that the defendants not kill the victim; the victim was overheard asking the victim's family for money; after an investigatory stop, the defendant was found in the back seat, along with the victim and a hidden gun; and the victim stated that the victim's life had been threatened. *Deleon-Alvarez v. State*, 324 Ga. App. 694, 751 S.E.2d 497 (2013).

Evidence was sufficient to convict the defendant of five counts of obtaining a controlled substance by fraud because, although only the defendant's alleged ac-

complice testified that the defendant possessed the requisite criminal intent to obtain possession of the controlled substances by fraud and deception, the state presented evidence of corroborating circumstances that proved the defendant's intent as the defendant went to the pharmacy on one occasion to pick up a medication that was clearly labeled as having been dispensed for the defendant, purportedly on the authority of a doctor who had never provided care for the defendant. *Hopkins v. State*, 328 Ga. App. 844, 761 S.E.2d 896 (2014).

Testimony corroborated in murder trial.

Contrary to the defendant's claim, the defendant's convictions did not rest solely on the uncorroborated testimony of an accomplice as the timing and circumstances supported the identity of the defendant as the mastermind. The defendant had ample motive to kill the victim to prevent the victim from testifying against the defendant and the plain inference that the defendant was responsible for menacing phone calls was uncontradicted. *Lindsey v. State*, 295 Ga. 343, 760 S.E.2d 170 (2014) (decided under former O.C.G.A. § 24-4-8).

Jury

Charge on corroboration required.

— Because there was evidence to support a finding that the witness was an accomplice, the trial court erred, pursuant to former O.C.G.A. § 24-4-8, in refusing to give the defendant's requested instruction on the need for corroboration of an accomplice's testimony. *Hamm v. State*, 294 Ga. 791, 756 S.E.2d 507 (2014) (decided under former O.C.G.A. § 24-4-8).

Instruction on slight evidence.

Trial court did not err when the court charged the jury on a dictionary definition of "corroborating evidence" in response to the jury's question asking for a definition of the term "slight corroboration" as the jury was properly instructed on the full scope of accomplice testimony; the definition of "corroborating evidence" given by the trial court was an accurate statement consistent with the law; the instruction on accomplice testimony was devoid of the term "slight corroboration" but rather

Jury (Cont'd)

used the terms “supporting evidence” and

“slight evidence from another source.”

Grimes v. State, 296 Ga. 337, 766 S.E.2d 72 (2014).

ARTICLE 2

PRESUMPTIONS AND ESTOPPEL

24-14-29. Equitable estoppel.

JUDICIAL DECISIONS

ANALYSIS

ILLUSTRATIONS

Illustrations

Equitable estoppel defense not available to defending trustee in action at law. — In a trust administration dispute, the trial court’s ruling that a trustee’s attempt to rely on the equitable defenses of unclean hands, laches, and

equitable estoppel failed was proper because the challenging beneficiary filed an action at law against the trustee seeking only money damages; thus, because it was an action at law, the equitable defenses of laches and unclean hands had no application to the case. *Hasty v. Castleberry*, 293 Ga. 727, 749 S.E.2d 676 (2013).

